

TELEOLOGICAL DESERT AND JUSTICE

BYUNG-SUN OH

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ABSTRACT OF THESIS

In this thesis I have tried to establish a theory of justice which would be plausible and acceptable in contemporary Korean society. The basic idea of justice I espouse is based on the notion of teleological desert. This is a liberal-communitarian conception of justice which is an amalgam between liberal individualism and traditional communitarian values. I have argued that the achievement of this kind of synthesis between two seemingly inconsistent and incompatible principles can be made possible only through the approach of a liberal perfectionist virtue ethics: for each member of society to become a more excellent human being in an autonomous way is a most viable way of realizing justice not only in personal relations but also in society at large.

In order to nurture perfectionist virtue I have advocated a creative reconstruction of traditional Confucian ethics in a way that can suit any contemporary industrialized and capitalist society. The essential elements worth drawing from traditional Confucian philosophy seem to be a kind of work-ethic that stresses self-fulfilment and human perfection through hard work and the nurturing of virtue, rendering a person due reward and punishment according to his or her desert, and the priority of righteousness and harmonious common good over social utility understood in purely hedonistic terms.

However, I have put equal stress on the right to individual autonomy and self-determination which is an essential element to establish and identify a person's desert and responsibility. The notions of human dignity and worth and the individual right to freedom and equality which were transplanted to the East from the West have under rigorous pressure taken root in the Korean political culture as can be seen in the Korean constitutional history of the recent past. I suppose that the protection of the individual right to autonomy and privacy is an inviolable principle in Korean political morality. I believe that the theory of justice I have espoused in this thesis which comprises the three principles of desert, needs, and legal rights may find its justification in the prevailing political morality of the great majority of contemporary Korean people. This is also reflected in the principle of the liberal welfare state to be drawn from the present Korean Constitution.

Although the principle of justice is essential and pivotal to building and maintaining a good society, it should not be regarded as an absolutely superior or all-encompassing notion to be applied to resolve any social issues. The principle of utility has a complementary or auxiliary part to play, and sometimes qualifies justice in a way which is necessary for securing the common good.

Declaration

In accordance with Regulation 2.4.15. I hereby declare that this thesis entitled "Teleological Desert and Justice" has been composed by me, and that it is my own work.

Author: Oh, Byung-Sun

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INTRODUCTION

When we face the vast disparities in wealth and resources between apparently equally hard-working people in the same society, we may be often puzzled. If a not insubstantial number of people are barely able to meet even their minimum nutritional needs, or to secure a basic shelter, while others spend a huge amount of money importing luxurious foreign furniture, or heating their private swimming pools, then, it is natural to ask, is this society running justly or fairly? Perhaps even more striking than this would be the fact that so many people tend to regard this state of affairs not as abnormal but even as a legitimate result of personal talent and industriousness, since they live in such a highly competitive and efficient society as a contemporary industrialized capitalist society. Yet, in other contexts, we may notice that the fairness of society's economic arrangements is an issue about which people feel strongly. Individuals argue, campaign, lobby, and fight over the justice of the allocation of economic goods. Are taxes fair? What about agricultural subsidies? Do corporations deserve their huge profits, or their executives and owners such large salaries and other benefits?

Arguments about distributive justice as well as commutative justice feature centrally in current political debates concerning law, social policy and economic organization. Inequalities of income, employment opportunities and property ownership, if not having a

proper justification, are liable to generate suspicion or the sense of injustice on the part of poorer people. Furthermore, deprivations which arise from unemployment, disablement and old age, uncompensated injuries sustained through accident or as a result of the criminal behaviour of others and the sufferings of the victims of state repression - all these, much more, are routinely denounced as not simply wrong, but unacceptably wrong because they are unjust.

Like the matter of economic justice with regard to just reward, the matter of penal justice with regard to just punishment is certainly a subject which must at some time have touched all of us closely, at least in our childhood, and the latter at any rate is one of those topics which may at times move to philosophical thought even the least speculatively inclined. For discussion as to the value of punishment is forced upon all who think either of the state's treatment of those who have offended against its laws or of the problems of the educator, topics which even the daily newspaper is continually bringing home to us.

Criminal punishment, or retributive justice, particularly presents a perplexing set of problems. Often when people break the law they are punished. The punishment may involve the loss of property or the loss of freedom. In the case of serious offences, the penalty can be imprisonment, and for some crimes the punishment can even be death. These practices are so familiar that we may accept them without question. Yet, upon reflection, they require justification. In taking away the money, the freedom, and the lives of

convicted persons, the state is doing them great harm; and whenever harm is done, some justification is required. When the state inflicts harm on criminals, it is required, in addition to the justification of punishment itself, to render a just or fair amount of punishment. There are traditionally two rival answers to this question, the retributivist answer and the utilitarian answer. However, in detail, each approach has a very complicated web of justifications and carries a wide variety of practical implications.

It is with the conflicting ideas of justice which emerge in argument about such contentious political issues of economic distribution and criminal punishment that this thesis is concerned. What is justice? Why does it really matter?

Justice governs our dealings with others. The very word 'justice' has associations with equality or equilibrium; To adjust something is to make it equal or equivalent to some standard, and to be an equal footing with or to be equitable to someone is thus a fundamental notion of justice. Justice is regarded as one of the cardinal human virtues attainment of which would make a human being perfect. And to be a perfect human being is our ideal. As an approach to a perfect state of human existence we need to know at least what justice is and how we can achieve justice.

The maxim of justice, 'to give to each one's due', requires us to ask what one's due is and how we can decide to give one his or her due. Since in the 'circumstances of

justice' we find it necessary to compare and discern each person from others to give each his or her own due, we should look after all at the qualities or attributes of each person. As to the discernment of personal characteristics for the sake of justice I shall propose that three criteria - moral desert, institutional desert (legal right or entitlement), and basic needs are relevant. The question to be answered is how, or in what manner, we can assess and rank, if feasible, the relative value of each person's moral or institutional desert, or basic needs. Furthermore, if there arises a conflict among those three seemingly competing criteria, how can we solve the problem of priority-setting among those three?

However, in this thesis I shall take a desert-based theory as the most important and pivotal criterion of justice and for that purpose my research will be mainly focused on the concept of desert, its application to the issues of reward and punishment. My argument of the notion of desert here is essentially teleological and thus differs both from deontological retributivism and from utilitarian consequentialism. Yet, in addition to the notion of desert as an essential criterion of just distribution, an equally important but competing notion of needs will be briefly dealt with for a better understanding of the location of desert in the conceptual structure of justice proposed in this thesis.

In the first chapter, the problem how the notion of desert can be applied as a criterion for just distribution will be examined. Valuable personal effort and labour

rather than contribution will be stressed as the essential basis of desert. In order to ascribe praise or blame to a person for his action or work, it is necessary to ask whether free will of the agent is presupposed or not. I shall contend that the notion of desert presupposes the free will of human beings as self-determining moral agents, though every person is in his thought and conduct influenced by his social, psychological, and physiological conditions.

In the second and following two chapters, as to the problem of punishment as a consequence of negative desert, its definition and competing theories of its justification will be examined. After backward-looking ideas of retributivism, forward-looking ideas of utilitarianism and quite a different kind of expressive theories will be examined.

In the fifth chapter, after an examination of compromise theories of teleological retributivism, my own 'teleological desert theory of punishment' will be proposed as a model account of just punishment. Also the principle of proportionality as the means of measuring and delimiting desert will be examined.

In the sixth chapter, the meaning of teleological desert, its relation to justice and the common good will be discussed. The notion of the common good will be shown to achieve completeness by comprising two seemingly rival principles, justice and utility.

In the seventh chapter, as the political and moral justification of my desert-based theory of justice, the

principle of liberal-communitarian value will be proposed. As the ground of endorsing personal autonomy and freedom I shall take perfectionist idea, namely the attainment of fundamental human goods though they are plural in nature.

In the eighth chapter, a complete picture of my theory of justice and the common good will be proposed in the form of two-stage justification. The schematic framework of two-stage justification will consist of seven sub-principles: 'the thesis of self-fulfilment', 'the thesis of free will and autonomous action', 'the thesis of equal opportunity for desert', 'the thesis of equal satisfaction of basic needs', 'the thesis of desert and justice discourse as teleological communication', 'the thesis of dynamic equilibrium and harmony' and finally 'the thesis of institutional natural law.

In the ninth chapter, I shall investigate the basic ideas of justice and law in the tradition of Confucian Philosophy in order to compare the differences and similarities between the East and the West. The basic findings of research in this thesis will be supposed to be applied to Eastern society, such a contemporary industrialized capitalistic country as Korea. For that purpose the underlying leitmotiv of my comparative study between the East and the West is to find the most viable and easily applicable theory of justice and law for Eastern society. As a practical verification of that applicability of syncretic ideas, I shall examine an actual Korean case of constitutional adjudication in regard to the matters of sexual morality and legal moralism. The case to be dealt

with in light of this synthesized idea of justice and law is a controversial area between traditionalists and liberalists, namely the issue of criminal punishment of adultery.

In the conclusion, I shall summarize the basic findings in the preceding discussions and conclude my contentions in favour of a desert-based theory of justice. In addition to that, I shall remind readers of the limits of justice as a moral or legal principle which is supposed to solve the social issues. And finally the wider and higher principle of the common good will be stressed; nonetheless, the principle of justice should be still essential, if subservient, to the principle of the common good.

(In this thesis with no intention of preference I may from time to time follow the convention of using forms of the masculine pronoun when referring indifferently to men and women.)

1 CHAPTER 1. DESERT AND JUST REWARD

I. Desert-based Justice.

I.1. Resurgence of desert.

Justice, in its primary meaning, characterizes states of affairs, situations. Just acts and just human beings are those that tend to bring just situations into being. The situation with which justice is concerned consists in an ensemble of possessive relations. Justice, then, may be defined as situations of rightful possession. (See Galston, 1980: 5)

To possess something rightfully is to hold it in accordance with one's entitlement or other valid claims. Rights, deserts and needs are considered to be three fundamental bases for valid claims. (For example, see Miller, 1976: part I) Among competing criteria for the just distribution of benefits and burdens in society, there has recently been a return to the idea that desert is a central criterion of justice.

In historical terms the idea that justice is a matter of people getting what they deserve is perhaps the most common and tenacious conception of justice. (Campbell, 1988: 150) Indeed the connection between justice and desert has been frequently cited as part of the very concept of justice itself. But in certain leading contribution to the contemporary debate over justice, desert has been almost completely excluded from justice. Rawls rejects desert in his seminal book '*A Theory Of Justice*' (See 1971: 103), and

many other writers have followed suit, for example Michael Walzer (*Spheres of Justice*, 1983: 23-5) Ronald Dworkin (*Taking Rights Seriously*, 2nd ed., 1978), and Bruce Ackerman (*Social Justice and the Liberal State*, 1980). The disappearance of desert is all the more remarkable in view of the prominence it has enjoyed in the tradition of Western political theory since Plato. (See Plato, *The Republic*, Book I, p.66; Plato, *The Laws*, Book VI, pp.229-30; Aristotle, *The Nicomachean Ethics*, Book V, Ch.3, pp.177-9; and Aristotle, *The Politics*, Book III, Ch.9, pp.195-8) To emphasize the importance of desert, some of that tradition will be reviewed here. (See Jackson, 1986: 62)

It was St. Paul who said, "Master give unto your servants that which is just and equal" [to their deserts]. (*The Letter of St. Paul to the Colossians*, Ch.4, verse 1; see also *Revelation*, Ch.22, verse 12, "My reward is with me, and I will give to everyone according to what he has done.") In the modern world Edmund Burke pined for a society in which it is an invariable law that a man's acquisitions are in proportion to his labours, while John Locke based his political theory on owning the fruits of one's labour. (*The Second Treatise on Government*, *Two Treatises of Government*, Ch.5, section 27, p.329)

Note that Karl Marx once wrote that, "the right of the producers is proportional to the labour they supply" (See *The Critique of the Gotha Programme*, in *Marx and Engels: Basic Writings*, L. S. Feuer, ed., 1969: 159). Marx's contemporary J. S. Mill argued that, "it is universally

considered just that each person should obtain that (whether good or evil) which he deserves". (*Utilitarianism*, M. Warnock, ed., 1962: 44)

Later Henry Sidgwick likened desert to the divine when he wrote that, "when we speak of the world as justly governed by God, we seem to mean that, if we could know the whole of human existence, we should find that happiness is distributed among men according to their deserts". (*The Methods of Ethics*, 7th ed., 1907: 280) In the twentieth century W. D. Ross advocated the apportionment of happiness to merit. (*The Right and the Good*, 1930: 21 and 138)

Recently several theorists have appeared to espouse desert-based theories of justice. Among them Joel Feinberg (*Doing and Deserving*, 1970), David Miller (*Social Justice*, 1976), William A. Galston (*Justice and the Human Good*, 1980), Alasdair MacIntyre (*After Virtue*, 1981), and Wojciech Sadurski (*Giving Desert its Due: Social Justice and Legal Theory*, 1985) are appealing and worthy of attention. Though they share some common ground in their arguments in favour of espousing a desert-based theory of justice, however, upon scrutiny, they have each a different idea of values relevant for its justification: their ideas of the political principle and value underlying the desert-based justice may be roughly classified into two groups, namely liberalism and communitarianism. Feinberg, Galston and Sadurski espouse a liberal idea of desert and justice; MacIntyre and Miller advocate a communitarian type of desert and justice, though within the same group the latter particularly shows strong favour toward the idea of justice

applicable to a socialist-type market economy. My idea of justice which I shall propose in this thesis is basically a desert-based theory but derives its justification from both liberalism and communitarianism. Thus, those works representing different approaches of desert-based theory of justice are taken to serve as the reference point for the issues raised in this thesis.

I.2. Why desert-based justice?

The idea of due deserts has the advantage of explaining the centrality of human agency in the idea of justice. This is because the general underlying aim of this conception of desert is to screen out all those factors that are unearned, that are beyond human control. Under the general conception of justice as equilibrium of benefits and burdens, desert is relevant to justice in distribution only where it expresses an actual burden, that is, when it involves some effort, sacrifice, work, risk, responsibility, inconvenience and so forth. It is only this sort of desert which should be in justice compensated by social benefits. This notion of desert is consistent with justice considered as an introduction of a conscious moral order into human affairs. (Sadurski, 1985: 116)

Hence here is the close association of justice with such notions as respect for persons, autonomy, self-determination and human dignity. Justice is important in human society not simply because we care about who gets what, but also because we wish to be treated as human beings whose actions and choices are to be taken seriously

and given respect. (Campbell, 1988: 155-6)

What does it mean here that desert-based justice involves maintaining an equilibrium between benefits and burdens? Desert-based theory holds that a society is just when the distribution of benefits and burdens is in accordance with the distribution of good (that is 'positive') and ill (that is 'negative') desert. Just actions are those which seek to maintain, achieve or restore this proportionality, particularly through the administration of appropriate rewards, punishment and compensations. Justice requires that, other things being equal, people ought to get (or be given) what they deserve.

Thus the general principle of social justice is that whenever an ideal, hypothetical balance of social benefits and burdens is upset, social justice calls for restoring it. An example of the application of justice as equilibrium is offered by Joel Feinberg:

The principle that unpleasant, onerous, and hazardous jobs deserve economic compensation, unlike the claim that superior ability deserves economic reward, is an equalitarian one, for it says only that deprivations for which there is no good reason should be compensated to the point where the deprived one is again brought back to a position of equality with his fellows. It is not that compensation gives him more than others (considering everything) but only that it allows him to catch up. (1970: 93)

Thus, this account of justice as restoring equilibrium is essentially in line with Aristotle's account of justice as equality which comprises notions both of distributive justice and of commutative justice. I shall discuss later in more detail the meanings of equality and equilibrium. (See Chapter 8, II.3 and II.6)

I.3. Characteristics of desert.

Recent scholarship has considerably clarified the concept of desert. We may summarize the major points among those which are notable as follows:

(i) Desert does not arise out of public institutions and rules. It is prior to and independent of them and may in certain circumstances be used as a criterion for judging them. (See Galston, 1980: 170)

(ii) Desert requires a basis, which must be some fact about the individual alleged to be deserving.

(iii) Not all facts about individuals are relevant to the question of desert. Every simple desert-claim is of the form: A deserves X in virtue of F. In general, then, there must be some relation between X and F, and the range of relevant F's will vary in accordance with the characteristics of the X under consideration.

(iv) Desert-related facts need not be moral characteristics.

(v) A desert-related fact has to be an action or effort of an individual. (See Barry, 1965: 106)

(vi) Desert judgments are justified on the basis of past and present facts about individuals, never on the basis of states of affairs to be created in the future. (See Miller, 1976: 93)

(vii) Deserved treatment may be divided into a number of distinct classes. Reward and punishment, praise and blame, etc.

Arguments about the concept of desert have been mostly centered on the above characteristics and showed divergent

views. First, we may distinguish, following Joel Feinberg, three kinds of conditions in respect to modes of treatment which persons can deserve. According to Feinberg's analysis, there are those whose satisfaction confers eligibility ('eligibility conditions'), those whose satisfaction confers entitlement ('qualification conditions'), and those conditions not specified in any regulatory or procedural rules whose satisfaction confers worthiness or desert ('desert bases'). (1970: 58) Then, we may argue that if a person is deserving of some sort of treatment, he must, necessarily, be so in virtue of some possessed characteristic or prior activity.

Truly here in the analysis of justice, what we are concerned with is desert bases, in other words, 'moral desert'. What does one mean here by this meritorian conception of moral desert? This notion of desert is normally taken to mean moral desert in two senses of 'moral'. (See Campbell, 1988: 151)

First because its preferred idea of moral desert is contrasted with 'conventional', or 'institutional' desert, which is acquired merely by satisfying established requirements. By contrast, the meritorian's moral desert is 'natural' or 'raw' in that it does not presuppose pre-existing social norms or distributional rules.

Take an example: we may say that a person 'deserves' a scholarship solely because he has met the criteria set for the award, whether or not this reflects his choices and efforts, but conventional or institutional desert of this sort is more a matter of entitlement than desert. Certainly

it is not the sort of desert with which the meritorian is principally concerned. In contrast to mere entitlement, moral, natural or raw desert features as a reason for establishing such conventional rules so as to ensure that scholarships and other benefits are distributed in accordance with what is antecedently thought of as deserving.

Desert may also be taken to be 'moral' in a second sense of that term in which it is now contrasted with 'natural' when this is equated with what happens 'naturally', that is, without human choice or intervention. Desert is then analytically tied to the notion of making choices and acting knowingly or intentionally, in contrast to 'natural' events which happen according to the normal processes of cause and effect. Thus responsibility, in the sense of accountability and liability to praise, blame, reward and punishment, is said to be attributable solely to agents, that is, to persons who can intentionally alter the course of 'natural' events through their own deliberate actions and according to their own purposes. Thus we can say that only the actions of such moral agents are said to be deserving or undeserving in the meritorian sense.

Meanwhile Sadurski points out that desert is (a) 'person-oriented', in that it is always attributed to persons on account of their conduct, (b) 'value-laden', in that it involves an assessment of this conduct as good or bad, and (c) 'past-oriented' in that when talking about desert, we are evaluating certain actions which have already happened. (Sadurski, 1985: 118) I agree with

Sadurski on first two points. However, I shall contend later that the last point raised by Sadurski is deficient for its being too narrow in scope. (See II.2 in this Chapter)

I.4. Deserved treatment.

No philosophical analysis of the concept of desert can go any further without paying separate attention to each of the major kinds of treatment which persons can be said to deserve. Then what are the various kinds of treatment that persons deserve from other persons? They may be varied, but they have at least one thing in common: they are generally 'affective' in character, that is, favoured or disfavoured, pursued or avoided, pleasant or unpleasant.

Feinberg argues persuasively that deserved treatment may be divided into a number of distinct classes. With no claim to taxonomic precision or completeness, he has divided them into five major classes as follows. (Feinberg, 1970: 62)

- (a) Awards of prizes.
- (b) Assignments of grades.
- (c) Rewards and punishments.
- (d) Praise, blame, and other informal responses.
- (e) Reparation, liability, and other modes of compensation.

He has not included positions of honour and economic benefits on above basic list because they are usually subsumed under one or another or some combination of the other headings.

Useful though this classification may be, however, there

is one difficulty. Feinberg notices, but does not sufficiently emphasize, the extent to which these categories are distributed along the same continua and thus tend to overlap one another. For example, it is a mistake to contend that all prize competitions are directed toward recognizing the single victor. It is possible to imagine, for example, a footrace in which the first across the finish line receives a predetermined sum while the others receive that sum minus an amount proportional to the difference between their elapsed time and that of the fastest. (For this point, see Galston, 1980: 175)

Nonetheless, Feinberg's analysis has two important consequences. First, it reveals that the contexts within which desert-claims are made differ from one another in two sorts of ways: the contexts may be different in kind, or contexts of the same kind may differ in the content of the human characteristics or activities with which they are particularly concerned. Second, our consideration of particular situations in which desert seems to be a relevant allocative criterion will be made more precise by asking, under what kind or kinds of desert contexts should this situation be subsumed? For example, we may ask, as Feinberg does, whether income is best regarded as prize, reward, or compensation, and our decision is likely to have a substantive effect on our theory of distribution. (1970: 88-94) Again, as Feinberg points out, similar difficulties arise in determining the distribution of positions of leadership and responsibility. (1970: 78-80)

However, I suppose that it will be convenient to approach

the matters by roughly classifying all the desert-claims according to their nature in three aspects of justice, though they are interrelated and overlapping. They are distributive justice (reward), retributive justice (punishment), and commutative justice (compensation). I shall hereafter mainly deal with the matters of reward and punishment.

II. Economic Desert and Reward.

II.1. Basis of economic desert.

One of the most important, and yet most difficult, problems which arises in an inquiry into desert and its relation to social justice is that of the basis upon which judgments of economic desert should be made. By economic desert I mean desert of monetary and other rewards for socially useful work - for doing one's job, in a society which has a division of labour. (See Miller, 1976: 102)

Which features of a person's work activity should be taken into account when we judge that he deserves such-and-such a reward? The principles which have seriously been put forward as determinants of economic desert can be reduced to three:

(a) Contribution: A man's reward should depend on the value of the contribution which he makes to social welfare in his work activity.

(b) Effort: A man's reward should depend on the effort which he expends in his work activity.

(c) Compensation: A man's reward should depend on the

costs which he incurs in his work activity.

But as David Miller has argued, (c) is not a genuine alternative to the first two principles. It is a refinement which may be used in conjunction with either (a) or (b). (1976: 103) Reward based either on contribution or on effort may carry a meaningful public approval of the value in that work in addition to compensation while compensation alone usually denotes mere restoration of previous equilibrium or restitution in human relations or business transactions. Thus the problem here is to adjudicate between (a) and (b).

For practical reasons of identifying and measuring desert, rewarding according to results or social contribution may be sometimes more productive and certainly easier than rewarding according to efforts. But it is only the bearing of actual burdens which calls for compensation when we are aiming at bringing about the equilibrium of advantages and burdens in society.

Then, what kind of efforts? Not every burden is relevant here. What counts, is a conscientious effort which has socially beneficial effects. It will be argued that effort is the only legitimate basis and measure of desert. Considerations of effects are important in so far as only socially valuable efforts count in considerations of desert. This social value cannot be ascertained in isolation from effects. Socially valuable effect is, therefore, a *conditio sine qua non* of taking a particular effort into account in consideration of desert. But only effort constitutes its basis and measure since it is

effort, and not effect, which can be meaningfully regarded as a burden imposed (or self-imposed) upon an individual.

II.2. Application of desert to income distribution and job placement.

When applying the notion of desert to the cases of income distribution and job placement, Sadurski suggests that an indiscriminate approach is not adequate. He espouses the view that, while justice based on desert (and desert understood essentially as based on effort) should be applied to the distribution of rewards for work done, for sacrifice, effort, time, etc., it does not apply to a distribution of jobs themselves. (Sadurski, 1985: 153)

The adoption of standards of distributive justice with respect to the former (i.e., distribution of rewards) does not imply necessarily the adoption of these same standards with respect to the latter (i.e., distribution of positions). The reason why he distinguishes distributive principles between income distribution and job placement is that in his opinion desert considerations are always past-oriented.

When talking about desert, he is evaluating certain actions which have already happened. He argues that this is why it is a confusion to base desert upon utilitarian grounds; for example, to say: "He deserves this job because he is most likely to do it well". He interprets this phrase as really meaning that the candidate will be useful but not necessarily that he 'deserves' it. Even if this utilitarian assessment is based upon past achievement of the person

hired or promoted, this past achievement is taken as an indication of probable future usefulness, not as a 'desert' to be rewarded. In practice, those two types of assessment, utility and desert, will often coincide because the demands of the job dictate that those most likely to do it well would have displayed this in past effort of some kind or other. Sadurski argues that conceptually there are two distinct types of evaluation and there is no necessary link between them. He takes as an example a situation in which these two types of considerations yield opposite results.

Let us imagine that there are two candidates for a recently vacated chair in a university: A is an old scholar with great academic achievements (gained through considerable personal sacrifices) and who has made a great contribution to the development of this particular branch of learning; B is young and a very talented lecturer who has not yet had an opportunity to fulfil his capabilities. According to Sadurski's interpretation, a selection committee might well appoint B, arguing that it prefers someone with great energy and promise for the future rather than someone who is 'over the hill'. In this case, the appointment will be based clearly upon utilitarian criteria which conflict, in this particular situation, with those of desert. (See 1985: 118)

I think this misinterprets the evaluation process involved in the assessment of desert, no matter what the final decision should be after all relevant conditions are considered in the above case. When we consider the distribution of reward and evaluate a person's

characteristics as bearing on the question whether he deserves something desirable, we essentially examine not only the person's past effort and performance but also his present state of potentiality. When we evaluate a person's desert, we consider the person as a going-concern. Hence, past effort and contribution plus present state of potentiality will often be taken as an indication of immediate probable future effort and contribution.

Immediately anticipated effort and achievement is not necessarily linked to the notion of utility for which a future-oriented utilitarian might argue. (For this point, see Honoré, 1970: 73-4) At the time of evaluation, when the reward for the desert is at issue, the assessor normally considers the past conduct, present state and sometimes, when it is relevant, potential future effort and contribution which can be reasonably anticipated by ordinary persons.

Justice is a matter for the present and the future. Justice is only meaningful for life in the present and the future since it is concerned with securing now a just state of affairs, even when this involves maintaining or establishing a just order by correcting past injustice.

To better understand the nature of matters of justice, let us consider a case of libel against a dead person who was innocent. The libel in this case can be described as a writing which tends to vilify the dead person and bring him or her into hatred, contempt and ridicule. We may raise the question of what is the matter with slandering a dead person. There is no actionable wrong against an existing

person, but a serious libel of a dead person may be held to be indictable on the ground that it is likely to provoke a breach of the peace or to disturb the peace of the present and future community. Since the libel of a dead person tends to bring the surviving relations of the deceased into hatred or contempt - in which case it seems to be a libel on them - it will be a matter of society's grave concern for the sake of criminal justice. The point is that the business of doing justice is seen to have a teleological nature in a sense that it will mend broken hearts of the persons concerned and their disrupted order of life, and through this it will restore the harmonious relation of all persons concerned. But this is not a matter of utilitarian consequentialism. My notion of teleological desert and justice is fundamentally different from utilitarian ideas, though both theories share the common characteristic of a forward-looking element. I shall discuss this point more in detail later. (See Chapter 5. 'Teleological Desert and Just Punishment')

The upshot of above arguments is that our assessment of a person's conduct and quality, past, present plus immediate potential, for the sake of justice, is an on-going project. Like the fundamentally teleological and developmental nature of human beings, the business of justice is an on-going project.

Thus reward in advance for the immediate probable future effort and contribution estimated on and combined with past effort and contribution (unlike a simple incentive system which is mainly aimed at encouraging future contribution)

can be built into the notion of desert. In every kind of job placement or selection procedure, we are considering whether this particular applicant or candidate is fit for this job or post basing on his past, present and potential value. Justice, in this sense as Leibniz observed, is a continuum: there is an unbroken continuity, with no 'gaps' between life and death, between rest and motion, between the lowest substance and God, just as there is a continuum between abstaining from injury and doing good. (See Leibniz, 1972: 21)

II.3. Effort or contribution.

(1) Contribution. One type of action-oriented meritorian might cite contribution as a relevant desert basis for pecuniary rewards, so that departures from equality in income are to be justified only by distinguished achievements in science, technology, art, philosophy, athletics, industry, and other basic areas of human activity. When the achievements under consideration are themselves contributions to our social wealth, this principle of distributive justice seems plausible. But not all persons enjoy fair equality of opportunity to achieve great things, and particularly economic rewards seem inappropriate as vehicles for expressing recognition and admiration of non-economic achievements. We should express general skepticism concerning such facile generalizations about the comparative degrees to which various individuals have contributed to our social wealth. (See Feinberg, 1973: 114-5)

If we examine the utilitarian arguments, it is probably true that the most convincing reasons which can be given for taking contribution, rather than effort, as a basis for reward are utilitarian in character. By rewarding people according to the value of their different contributions, we encourage them to develop the skills and abilities which produce a superior contribution, and this result is socially useful. But as David Miller has argued, to use such utilitarian arguments to establish a principle of desert seems inconsistent. If one starts from utilitarian premisses, and regards rewards as incentives to acquire useful skills, etc., then the correct principle is to reward only those contributions which would not be made in the absence of such reward, the contributions, in other words, which have to be called forth by material incentives. (Miller, 1976: 103-4) A reward can only act as an incentive if it is capable of modifying the conduct of those to whom it is given, and this generates cases in which our judgments of desert will not correspond to the proposed utilitarian principle. Suppose that a certain community wants to increase its blood reserve in blood banks and therefore institutes a system of charity benefits, giving donors special medical service privileges for each donation they make. These could be understood either as straightforward incentives to make donations, or as rewards for the performance of socially valuable actions. The difference will emerge if we examine within the community a religious group whose blood donations are generally governed by their religious beliefs, with the

result that the amount of blood donations from members of the religious group is unaffected by the introduction of the system of benefits. If the benefits are pure incentives, they will not be given to donors who belong to the religious group. If they are rewards, however, the religious group must be given what they deserve, for they have performed the required socially valuable actions.

When contribution is employed as a criterion of desert, it is often conjoined with an economic theory that purports to determine exactly what percentage of our total economic product a given worker or class has produced. Justice, according to this principle, requires that each worker get back exactly that proportion of the national wealth that he has himself created. This sounds very much like a principle of 'commutative justice' directing us to give back to every worker what is really his own property, that is, the product of his own labour. (Feinberg, 1973: 114) This argument apparently sounds plausible since its two justifying reasons - labour theory of property right and the principle of commutative justice, respectively command a strong persuasive power. However, this argument will lose ground when we challenge its assumption that all the personal contributions are the individual's own products as he or she may claim. Thus, it is worthwhile examining the possibility of challenging these assumptions.

As a classic example of this kind of theorist, let us take Pierre J. Proudhon, the French socialist writer and precursor of Karl Marx. In his book, *What is Property?* (1840), Proudhon rejected the standard socialist slogan,

'From each according to his ability, to each according to his needs', in favor of a principle of distributive justice based on contribution, as interpreted by an economic theory that employed a pre-Marxist 'theory of surplus value'. He argued that the afore-quoted famous standard socialist slogan was not intended, in any case, to express a principle of distributive justice. It was understood to be a rejection of all considerations of 'mere' justice for an ethic of human brotherhood. The early socialists contended that it is unfair, in a way, to give the great contributors to our wealth a disproportionately small share of the product. Thus, in the new socialist society espoused by Karl Marx and his followers, love of neighbour, community spirit, and absence of avarice would overwhelm such bourgeois notions and put them in their proper (subordinate) place.

Proudhon, on the other hand, based his whole social philosophy not on brotherhood (an ideal he found suitable only for small groups such as families) but on a kind of distributive justice, namely, the 'return of contribution' principle. His celebrated dictum that 'property is theft' did not imply that all possession of goods is illicit, but rather that the system of rules that permitted the owner of a factory to hire workers and draw profits ('surplus value') from their labour robs the workers of what is rightly theirs. "This profit, consisting of a portion of the proceeds of labour that rightly belonged to the labourer himself, was theft". The injustice of capitalism, according to Proudhon, consists in the fact that those who

create the wealth (through their labour) get only a small part of what they create, whereas those who exploit their labour, like voracious parasites, gather in a greatly disproportionate share. The 'return of contribution' principle of distributive justice, then, cannot work in a capitalist system, but requires a '*fédération mutualiste*' of autonomous producer-cooperatives in which those who create wealth by their work share it in proportion to their real contributions. (See Feinberg, 1973: 114-5)

Other theorists, employing different notions of what produces or 'creates' economic wealth, have used the 'return of contribution' principle to support quite opposite conclusions. The contribution principle has even been used to uphold the justice of existing property holdings under capitalistic systems, for it is said that capital as well as labour creates wealth, as do ingenious ideas, inventions, and adventurous risk-taking. The capitalist who provided the money, the inventor who designed a product to be manufactured, the innovator who thought of a new mode of production and marketing, the advertiser who persuaded millions of customers to buy the finished product, the investor who risked his savings on the success of the enterprise - these are the ones, it is said, who did the most to produce the wealth created by a business, not the workers who contributed only their labour, and of course, these are the ones who tend, on the whole, to receive the largest personal incomes. (See Feinberg, 1973: 115)

These arguments seem hard to answer at first sight, yet

their force is lost when we see that a question-begging assumption has been made at the outset. In comparing the remuneration of each individual's work at the time of an exchange between individual and society, we take it for granted that each person has a complete right to the object which enters into the exchange. But not only are there impossibly difficult problems of measurement of individual contribution involved, there are also conceptual problems that appear beyond all nonarbitrary solution. We can refer to the elements of luck and chance, the social factors not attributable to any assignable individuals, and the contributions of population trends, uncreated natural resources, and the efforts of people now dead, which are often central to the explanation of a given increment of social wealth.

As L. T. Hobhouse pointed out, any individual contribution would be very small relative to the immeasurably greater contribution made by political, social, fortuitous, natural, and inherited factors. (Hobhouse, 1922: 161-3) Thus, strict application of the 'return of contribution' principle, no matter in whose name, industrialists or labourers, would tend to support a larger claim for the community to its own 'due return', through taxation and other devices.

(2) Rewarding according to effort rather than contribution. Up to now, two main alternative measures of desert are considered: conscientious effort or objective contribution. It should be clear from the preceding arguments that effort should be the principal criterion of

desert, mainly because 'contribution' or 'success' reflect, among other things, factors which are beyond our control and thus for which we cannot claim any credit. For example, when an airline reservation clerk mistakenly cancels my booking and the plane on which I wanted to fly has an accident, there is no reason why the clerk should feel that he or she deserves my gratitude, let alone reward, although my life was saved. (See Sadurski, 1985: 135)

In the distribution of salaries according to productive effects we are indirectly rewarding people for factors which are independent of their own will and effort. Although we often have to assess an objective contribution, we should not take it into account in its own right but rather only in so far as it is the best available measure of actual effort. Consequently, it is a distribution according to contribution only in a derivative sense, for want of any better measure of socially valuable effort. (See *ibid.*)

So far, the argument in favour of effort is based on the idea that a man can only deserve reward for what it is within his power to do. This argument depends upon the more basic claim that a man's desert depends wholly upon his voluntary actions. With regard to the voluntariness of a man's effort, the question has arisen whether ability can be accepted as a product of voluntary action and effort. Take an example: if two men try equally hard, and work for an equally long time, then it may be assumed according to the principle of effort that they deserve equal remuneration even if one of them, by virtue of superior

ability, manages to produce more goods, or goods of a better quality.

Again, according to the same view it may be expedient to remunerate superior skill, etc., but it would not be thought always just, because some man with inherited superior skill does not deserve more than the less-skilled, assuming that each does the best he can. Take another example: consider the case of the drowning man. Suppose that two men jump in to save him, and that one manages to reach him while the other, who has tried just as hard but by nature is physically weak, fails and has to turn back. We would say that the first man deserves more gratitude (and reward, perhaps) than the second, yet the second deserves some thanks for having tried to help. But if we go further and understand that moral desert should depend entirely upon what is within a man's control, that is on his efforts and the choices he makes, then we would say that two men deserve equal gratitude and reward.

In the above examples, surely native skills and inherited aptitudes will not be appropriate bases of desert, since they are forms of merit ruled out by the fair opportunity principle. The fair opportunity principle (or the fair equality of opportunity principle) is here the principle that a personal characteristic can be a fair basis for discrimination between persons only if those persons had a fair equality of opportunity to develop or avoid them. (For this point, see Feinberg, 1973: 108; see and compare with Rawls's view of fair equality of opportunity, 1971: 73) No one deserves credit or blame for his genetic inheritance,

since no one has the opportunity to select his own genes.

Then what about acquired skills? Feinberg has argued that acquired skills are, though they may seem more plausible candidates at first, upon scrutiny little better. All acquired skills depend to a large degree on native skills. Nobody is born knowing how to read, so reading is an acquired skill, but actual differences in reading skill are to a large degree accounted for by genetic differences that are beyond anyone's control. (1973: 112-3) But here we may still have some differences in acquired skills that are to be accounted for solely or primarily by differences in the degree of practice, drill, and perseverance expended by persons with roughly equal opportunities. In this respect, the acquired skill can be a relevant basis of desert only to the extent that it is a product of one's own effort and the requirement of fair equality of opportunity can be met.

James C. Dick has also argued that if two persons have an equal opportunity to develop a particular innate talent they share equally at the outset and one does so more successfully than the other by dint of great effort, then there is a ground for discrimination, but on the basis of effort, not ability. (1975: 259)

Surely certain of the skills and abilities which a man uses in his work are products of previous voluntary actions - for example, the decision to attend training courses - and there is no reason to tie desert to present voluntary actions at the expense of earlier ones. (Barry, 1965: 108) Thus it would be safe to argue that the voluntary decision to acquire a useful skill should be rewarded in the future

when the skill is exercised.

The logical consequence of adopting the principle that desert depends on voluntary action is not that effort alone should be taken as a desert basis at the expense of all differences in ability and skill, but rather that effort and voluntarily acquired abilities should be separated from innate abilities and abilities implanted by other people. This principle of composite effort, namely, effort and acquired ability can entail subsuming the general character of the contribution principle in contrast to the much more egalitarian principle of effort alone. (See Miller, 1976: 108) This is because the former principle of composite effort can easily accept the differences of outcome in competition between two persons with an equivalent effort-making opportunity but with a different ability acquired previously from a valuable effort; the latter principle of simple effort tends to disregard the acquired ability before the competition starts, accepting only the differences of outcome brought forth from equal effort-making opportunity but differing effort expended between competitors who are presumed to have equal ability and quality.

But here a problem arises. As David Miller has argued, the resulting principle of composite effort may be almost impossible to apply, since any useful piece of work will require a combination of effort, innate ability, and acquired ability, and one cannot usually say how much of the result should be put down to the voluntary acts of the person concerned. This is one of the weakest points of

desert-cum-effort theory and precisely is a point of departure in the main argument against desert. Because of this weak point in the justice as desert approach the positive desert claim is liable to be negated. (See Goodin, 1985; he claims that the notion of desert can be only meaningfully used in the context of institutional desert, where a person is called to deserve some treatment when he or she meets a certain requirement) The most profound theoretical argument against the concept of desert in general and effort in particular is that they are involuntarily determined. Whereas one's basic ability (natural endowments in John Rawls's parlance) is determined by nature, effort is said to be determined by social environment.

II.4. Natural abilities and anti-desert argument.

In social philosophy a familiar argument about justice is that because no one deserves either his native talents or his ability to exert effort, no one can be said to deserve any advantages made possible by his talents or abilities. The premises of this argument are perhaps most clearly stated in the following well-known passage from John Rawls's *A Theory of Justice*:

It seems to be one of the fixed points of our considered judgments that no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society. The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases. (1971: 104; see also 1971: 15, 75-6, 310-5,

and passim.)

If these contentions are correct, and if Rawls is also correct in concluding from them that no one deserves "the greater advantages he could achieve with (his natural endowments)", (1971: 104) then personal desert will play no role at all in determining which system of distributing goods is just.

Before we can begin any evaluation of Rawls' argument against personal desert, we must get somewhat clearer about what that argument says. We have seen that Rawls wants to move from the premise that people do not deserve their character or abilities to the conclusion that people do not deserve the advantages which these 'natural assets' make possible. But why, exactly, does Rawls believe that people do not deserve their character and abilities in the first place?

Because Rawls mentions the social causes of our effort-making abilities, and because our other abilities seem obviously to be caused as well, he may be interpreted as claiming that our natural assets are undeserved simply because they are caused, or rather, he can be interpreted as claiming that our natural assets are undeserved because they are brought into existence by events independent of anything we ourselves have done. Let us go one step further in his explanation. A person may indeed take steps to develop his talents and increase his effort-making capacity; but his ability to take such steps must itself depend on some earlier complement of talents and effort-making abilities which are not the result of any

such actions. Because of this, he may indeed be held unable to 'claim credit' for any of these earlier talents or abilities.

Rawls's argument so far seems to fulfil the conditions of determinism, though it is not the complete genetic determinism of Aldous Huxley's *Brave New World*. It holds that the individual is not responsible for the quality (effort-making ability, that is, character) that makes possible the deserving deed (effort expended). The individual is not responsible because character (which determines effort) is a product of the natural and social environment.

The proposition that natural assets should be considered as irrelevant for a distribution of goods can be derived from Rawls's argument that "the distributive shares that result do not correlate with moral worth, since the initial endowments of natural assets and the contingencies of their growth and nurture in early life are arbitrary from a moral point of view". (1971: 311-2) About this Sadurski points out that it is a misleading formulation of the problem. He argues that the distribution of natural assets and endowments is neither in itself arbitrary nor non-arbitrary (in particular, when the adjective 'arbitrary' has negative connotations) (Sadurski, 1985: 124) According to him, there is nothing good or bad about it; it is simply a natural fact which cannot be assessed from the moral point of view because it is totally beyond human control. What may be evaluated as arbitrary or not here is the way in which social institutions and practices treat this distribution

of natural endowments. The natural distribution is morally neutral but its social use is not. Therefore what is here a matter of concern is not the distribution of natural assets, but the distribution of social benefits and burdens on the basis of, or in relation to, the natural distribution which may be called arbitrary. (Ibid.)

What does the above argument precisely mean? It is essentially related to a task of a theory of justice. Let's examine a social phenomenon concerning a distributive matter. A person born more intelligent, more skilful or more beautiful will usually have a better chance than less favoured people of an interesting and satisfying life. It would be silly to ruin these chances in the name of abstract justice; however there is no reason to claim that the person deserves those good things of life uniquely on the basis of inborn intelligence, skills or beauty. It would be more convincing when we approach the issue from the other side: a person born less intelligent, less skilful and less able cannot be said to deserve his or her unhappier or less fortunate life solely on the basis of absence of skill or capacities etc. It is precisely a task of a theory of justice to reflect about what a society can do to compensate this person for undeserved and unearned suffering. (See Sadurski, 1985: 123)

Then there might be raised an objection that positive social obligations of compensation do not follow from the natural disadvantages which are of a negative character, that is, an absence of skill or capacities etc. To the question in this case we might answer that society's duty

of rectification follows not from purely natural deprivations but from the fact that those deprivations are turned by a society into social disadvantages and penalties.

These social disadvantages are themselves, as Sadurski observes, considered to be culturally-shaped consequences of the existing system of rating, rather than something inevitable in the nature of physical or mental handicaps. Thus it would be a matter of social institutions, values and practices that a less gifted person bears additional burdens through no fault of his own. (Ibid.)

A conclusion to be drawn from the above arguments is that one of the functions of justice is to rectify, at least in part, or at least to minimize, consequences of the natural and social lottery which are beyond human control. It has nothing to do with an attempt to make all people alike but it is rather an attempt to put justice on a firm, deliberately determined moral basis. The moral idea is that of making a person the master of his or her place in the social distribution.

II.5. Acquired abilities and desert.

Notwithstanding arguments against the principle of desert-cum-effort, there remains a possibility of vindicating it by reference to the argument that persons of equivalent basic ability may use that ability in different ways; one may procrastinate while the other is diligent, and so on. As George Sher has argued, there is obviously room for a distinction between the possession of an ability

to exert effort and the exercise of that ability; and given this distinction, it is easy to understand the difference between one man's efforts and another's without supposing that they differ in effort-making ability. (Sher, 1979: 368) To do this, we need only view the difference in their efforts as stemming from the different degrees to which they have exercised their common effort-making ability. (Ibid.)

Also P. H. Nowell-Smith argued that the discovery of a cause of something has no necessary bearing on a verdict about that thing. He gave his explanation as follows:

We know that a man has come to be what he is because of three main types of cause, heredity, education, and his own past actions. These three factors are not independent of each other and it is not the business of a philosopher to say exactly what is the effect of each or which is the most important for moral training... But it is the business of a philosopher to show in what ways these 'causes' are related to responsibility. Now these three factors also play a part in situations in which non-moral verdicts are given... Leopold Mozart was a competent musician; his son Wolfgang was given a good musical education and practised his art assiduously. Each of these factors helps to explain how he was able to compose and play well. There is plenty of evidence that musical ability runs in families and still more of the effects of teaching and practice. But, having learnt these facts, we do not have the slightest tendency to say that, because Mozart's abilities were 'due' to heredity, teaching, and practice, his compositions were not 'really' his own, or to abate one jot of our admiration. (1954: 298)

The important points to be drawn from the above discussions are three: Firstly, it seems to be, to a certain degree, inevitable in human society that inherited talents and social environment play a role in making a person able to perform some kind of work or to be some kind of person. Secondly, when we evaluate a person's qualities,

however, the most important element to be taken into account of human value is, after differences of natural endowment and social background of each person are considered, the distinctive characteristics of each individual person enabling him to exert voluntarily and intentionally worthy effort resulting in some valuable social contributions. Thirdly, the value or virtue of a person will be most conspicuously manifested and then praised when a person assiduously overcomes disadvantages or handicaps which might have been caused by nature or social environment and thereby voluntarily makes a valuable contribution to the society as well as himself or herself.

III. Determinism, Free Will and Desert.

III.1. Controversy over free will.

(1) Controversy. Recalling the structure of Rawls's argument against desert, his claim is that persons in the original position would not choose desert as a fundamental principle of justice, because the bases for desert judgments (character and effort) are determined. But our arguments for the principles of justice-as-desert and desert-cum-effort shows that those are justified only in so far as people can freely control their actions. Then the troublesome question arises: is there anything that we can influence and that is under our control? Is there anything in this world that we can claim credit for and, therefore, can we deserve anything? If the grounds which are proposed in our argument as a legitimate basis of desert (namely,

effort and acquired ability) are as much beyond our control as our natural endowments, then the principle of justice based on desert is untenable.

In the context of the controversy over free will, determinism is equated with the concepts of causation and predictability. Determinism, in this sense, is the view that every event has a cause and is in principle predictable or unavoidable. This statement means that for every event in the universe there is a set of conditions such that, if the conditions C are fulfilled, the event E invariably occurs; if the same antecedent conditions should be present in the future, the same event would occur. No other event will occur, given these exact conditions.

If everything is thus determined by antecedent conditions, how can we consider man's actions to be free and hold him morally responsible for his acts? Is the belief that everything is determined incompatible with the concept of freedom? These are some of the quintessential questions we should tackle when examining the problem of free will and desert for human effort.

Since there are a vast amount of writings on this controversial topic of determinism and free will, it is difficult to add much that is new on this within a short section of this Chapter. Thus, I shall better summarize the various positions on this topic aiming at locating my own view within the existing controversies, rather than making any radically new argument about it.

There are four possible positions that can be taken with

respect to the relation between determinism and free will. First, the belief that determinism is false and freedom is true. This position is sometimes known as 'libertarianism' or 'indeterminism'. Second, the belief that both determinism and freedom are true; determinism is compatible with the notion of freedom ('the compatibility thesis'). This position is usually known as 'soft determinism'. Third, the belief that determinism is true and freedom is false ('the incompatibility thesis'). This is the position of the 'hard determinism'. Fourth, the belief that both determinism and freedom are false. In the history of the controversy over free will no attempt has been made to justify this last position. (See D'Angelo, 1968: 2)

My position here is a kind of compatibilism or a weaker version of libertarianism, with the belief that not only within causation but because of it, human beings are free to plan and choose their actions. Before elaborating and defending my position, I shall discuss the main ideas of each position. Since the above four positions either accept or reject the notion of determinism, let us first examine the arguments of determinism.

(2) Determinism. The usual model on which a definition of determinism is constituted is the kind of knowledge gained by the physical sciences. The main arguments for determinism can be formulated as follows: For any event E, (a) The occurrence of E was causally necessitated, (b) The occurrence of E has a sufficient explanation in causal terms, (c) E had sufficient antecedent conditions, (d) The occurrence of E was in principle predictable, (e) There

exist a set of events, C, and a true law of nature, L, which asserts that if C were to occur then E would occur. (See Gerald Dworkin, 1970: 4)

(3) Soft determinism. For the soft determinist, determinism and freedom are compatible. According to this compatibility thesis, determinism must be accepted because it is certainly true that every event has a cause. On the other hand, the idea of freedom must also be accepted because there is a valid distinction between action which is free or voluntary and action which is compelled or involuntary. The two views are compatible, however, it is alleged, because the distinction between the voluntary and the involuntary is not a distinction between the uncaused and the caused. All actions are caused, but some have internal causes and others have external causes.

D. D. Raphael gives an example for an understanding:

If you stay in your study because you want to do so, you stay of your own free will; you act voluntarily. If you stay in your study because somebody has locked the door and taken away the key, you stay under compulsion; you act involuntarily. (Raphael, 1981: 96)

That seems to be a proper distinction. But according to the soft determinists, it does not affect the truth of the statement that in either case your action has a cause. When the cause is internal, a desire of the agent, we say that he acts voluntarily, of his own free will or wish. When the cause is external and happens to clash with what the agent wants to do, we say that he acts involuntarily or is compelled. It is perfectly possible to act voluntarily and yet from a necessitating cause. The proper distinction to be drawn, according to this soft determinism, is a

distinction between freedom and compulsion, not between freedom and necessity. (See *ibid.*)

According to the soft determinists, determinism is not only compatible with freedom, but also compatible with moral responsibility and punishment. They claim that determinism is compatible with a corrective view of blame and punishment. They argue that we blame and punish people because we believe that blame and punishment function as causal or determining factors in modifying the behaviour of certain individuals. In this perspective, the soft determinists may reject a retributive justification for blame and punishment and accept a deterrent and reformative basis for blaming and punishing certain individuals. (For this point, see D'Angelo, 1968: 36)

Let us take P. H. Nowell-Smith's view for an example. Nowell-Smith has argued that an individual is morally responsible if his behaviour can be altered in the future by means of praise and blame. Only those acts that can be altered by means of praise and blame or reward and punishment are considered moral. Rewards and punishments are distributed, not because they are deserved, but because they are useful in altering the behaviour of some individuals. (See Nowell-Smith, 1954: 294 and 299)

When Nowell-Smith contends that we hold a thief morally responsible but do not hold a kleptomaniac morally responsible, the reason is that we believe that the fear of punishment will affect the future behaviour of the thief but not that of a kleptomaniac. (See Nowell-Smith, 1948: 59) Then a question arises; can blame and punishment be

justified solely by their effects and not by other factors as Nowell-Smith has contended? I doubt this. As M. Mandelbaum has argued, praise and blame are not merely justified by their effects, but rather we praise someone because we think his action is right and we blame someone because we think his action is wrong. (See Mandelbaum, 1960: 210) But I cannot agree with Mandelbaum when he contends that the future conduct of those we praise and blame is purely coincidental. (See *ibid.*) I think that the future conduct of those we praise and blame should be regarded as relevant to our acts of praise and blame, not decisive. We attach a greater degree of praise to the person who not only has done a good deed but also has a potential of that in a foreseeable future than to the person who merely has done a good deed. The same kind of different degree of blame can be given to the person according to the different degrees of value attaching to his past deeds and the present attributes.

However, soft determinism has been attacked from both sides by the hard determinists and the indeterminists. The libertarian indeterminists attack soft determinism on following points. First, it fails to acknowledge that human beings have a special capacity of free will which no other animal has. Secondly, it does not allow for freedom of choice, that is, freedom from restraint by physical or psychological causes upon choosing between options; it allows only for freedom of action, that is, freedom from restraint by the action of other persons. (See Raphael, 1981: 82 and 96-7) These criticisms have some force but are

not all convincing since human beings are not completely free from restraint by physical or psychological conditions. I shall discuss these points later in more detail.

(4) Hard determinism. The hard determinists contend that determinism is incompatible with the concepts of free choice and moral responsibility. The hard determinists criticize the soft determinists for not pursuing their analysis far enough. The soft determinists arbitrarily stop their analysis of the problem at the desires or choices that are the cause of some of our actions. The hard determinists assert that this is a shortsighted view of the entire problem; we must continue our analysis and inquire as to the causes of our desires and choices. The hard determinists do not make the claim that human beings never cause anything to happen, but they do maintain that if we trace the chain of causes back far enough, we will discover that ultimately our desires and choices are caused by factors outside of our control.

John Hospers has argued that the soft determinist's conception of freedom and responsibility is inadequate because it defines freedom and responsibility solely in relation to the conscious acts of individuals. Hospers has contended that if we were aware of the effect that unconscious motivation had upon our conscious and deliberate acts, we would not consider man to be free or morally responsible. (Hospers, 1952: 563)

According to the thoroughgoing determinists, a really full explanation of any human action would show that what

happened really was inevitable; so responsibility and choice are excluded. But the hard determinist's contention that no one is morally responsible or blameworthy does not imply that no one should be punished. The deterrent and reformative theories of punishment are compatible with the hard determinist's contention that no one is blameworthy. No blame does not imply no prisons for the hard determinist. Prisons are places to confine certain people whose behaviour is detrimental to society. In this sense, according to the hard determinist, we can evaluate the acts of people as being good or bad and can place them in prisons if necessary. (See D'Angelo, 1968: 90-1)

(5) Indeterminism or Libertarianism. The libertarian believes that the concept of freedom is incompatible with the concept of determinism. Since man is sometimes considered free to act in alternative ways, libertarians deny the validity of determinism. J. R. Lucas asserts of reasons for actions when vindicating free will: "If men have free will, then no complete explanation of their actions can be given, except by reference to themselves. We can give their reasons. But we cannot explain why their reasons were reasons for them." (Lucas, 1970: 171) This account of free will seems to be a far-flung libertarianism.

A more modest but thoroughgoing version of libertarianism was argued by Charles A. Campbell. C. A. Campbell is perhaps a representative libertarian of this century. Campbell agrees that the causal principle operates throughout most of nature, but he contends that certain

types of human actions are not subject to causal laws. For Campbell, an act is free in the sense required for moral responsibility if the person is the sole cause of the act and if he could have acted in alternative ways. (See Campbell, 1970: 110)

Furthermore, C. A. Campbell denies the belief that all human actions and decisions are caused by an individual's heredity and environment. He points out that a free act is not an uncaused act, but rather an act caused by the 'self' as distinct from the 'character' of an individual. Campbell uses the phrase 'contra-causal freedom' in order to express what he means by a free act. What he espouses is that a contra-causal freedom posits a breach of causal continuity between a man's character and his conduct. (See Campbell, 1951: 459-60)

Why do human beings believe in an indissoluble core of purely self-originated activity which even heredity and environment are powerless to affect? Campbell claims that introspection reveals that in situations of moral temptation the self decides whether to follow its inclinations or to exert the effort needed to act in accordance with the sense of duty.

Is Campbell's concept of the self empirically verifiable? Since some beliefs derived from introspection have been found to be illusory or false, as many determinists have pointed out, it is reasonable for them to request some evidence that the belief in contra-causal freedom is not an illusion. Campbell agrees that from the standpoint of an external observer the concept of self is unintelligible and

has no meaning. He asserts that there is no reason to accept this limitation when we are considering a subjective activity. Campbell claims that from an inner standpoint it is meaningful to say an act is caused by a person's self and not by his character. (See 1970: 110)

Campbell maintains that the self is distinct from man's character. The self comprehends a man's character and has the creative power to change man's character. Campbell argues that since the self is aware of its evaluation of the character, it cannot be derived or caused by the character. Why not? He answers that the self is the act of deciding whether to accept one's character or to change it in a situation of moral temptation.

However, I doubt that there can be any clear-cut demarcation between the deciding self and the changed character within the human mind. I suspect that it does not necessarily follow that because a man is capable of evaluating his character, the decision he makes is not caused by some aspect of his character. The fact that an individual can decide whether or not to evaluate all his character does not mean that this decision is never caused by some decision-making character he has made within himself in the past.

A compatibilist or a weak libertarian would argue that a man's character is composed of all his beliefs, values, and attitudes, as well as many other factors. All mental processes, including the decision to change his character, are part of a man's character. In this sense, the self is part of a man's character and is caused by an aspect of the

character. Thus, I think that the decision-making self which evaluates one's character in a situation of moral temptation would be perfectly compatible with the notion of universal causation.

III.2. Free will, moral sense and desert.

Recently Agnes Heller has asserted on the notion of 'moral sense' that, 'moral sense must be tantamount to the ability to discriminate between good and evil as well as between right and wrong... Everyone is born with moral sense, because the imperative that everyone should discriminate properly between good and evil, implies that everyone can do it.' (See Heller, 1987: 128) According to her, 'The statement "Every human being is born with moral sense" implies that every healthy specimen of our species has the ability to discriminate between good and evil (or, right and wrong).' (Ibid.)

I agree on the idea that moral sense or moral consciousness which can govern human conduct and create human experience should be given the most important role in ascribing moral responsibility. However, it is in the area of consciousness, or in the human mind and reasoning on which most soft determinists and libertarians base their arguments for human freedom. I support the weak version of libertarianism that there exists a limited determinism in that people cannot help that they are born, how they are born, to which parents they are born; but I believe that people can help determine how they live.

We may have been born crippled or blind, and we were not

free to choose otherwise, but we are free in how we choose to live with our infirmity. We are determined in our physical limitations, we are even determined by the culture, economic level, and family in which we are born, but we are not completely determined, unless we voluntarily choose to be, in how we live out our life, even though it has been influenced, in part, by all of these things.

Likewise, Jacques Maritain has contended that: "Free will in man does not exclude but rather presupposes the vast and complex dynamism of instincts, tendencies, psycho-physical dispositions, acquired habits and hereditary charges, and it is at the top point where this dynamism emerges into the world of spirit that freedom of choice is exercised, to give or not to give decisive efficacy to the inclinations and thrusts of nature; it follows from this that [we have] freedom of choice, as well as responsibility..." (See Evans and Ward, 1956: 30)

However, it is here worthwhile asking whether this idea of free will and moral sense has any incompatibility to the counterpart idea of the traditional Confucian Philosophy where I shall also draw essential sources of value and moral idea for constructing my philosophical view.

Surely, like the accounts of C. A. Campbell and A. Heller, the idea that from introspection a man can derive a sense of duty is nothing novel in Chinese Confucianism. Confucianists believe that since all men are equal as to their intrinsic ethical value and the potentiality for their ethical growth, they are equally responsible for their moral effort. Such an idea of man as a moral agent



gives rise to the concept of moral responsibility. (See Kim, 1981: 128)

In the Confucian ethical tradition, moral responsibility presupposes that a person can make a difference in his own character by what he himself does. It presupposes that a person can build his own character by cultivating virtuous interests. Thus the conditioning of a person's own conduct by his character is implied in the concept of moral responsibility. Moral responsibility also implies a person's selecting a way of life, or rules of conduct, which he himself may acknowledge as worthy of his efforts to conform to it. (Ibid.)

We can find a source of such an idea from Mencius's assertion that if one submits oneself to the authority of the mind, one has the innate ability to discover what is right for oneself because one's nature is perfect or complete from one's birth. (Chang, 1962: 86)

Roberto M. Unger's account of Confucianism gives us further evidence that: 'the moral sense exists in man either as a general disposition toward humanity (jen) and righteousness (i), from which standards might be drawn, or as a tacit code of conduct. Under proper conditions of upbringing and of government, this moral sense could develop so as to ensure harmony in the individual, in society... The aim was to elicit latent, pre-existing notions of propriety.' (1976: 107)

Now, based on our examination of determinism, free will and desert so far, we can draw some conclusions. With the acceptance of a kind of compatibility between determinism

and free will, or a weak libertarian viewpoint, then, it does make sense to assign moral responsibility to human beings when they voluntarily choose something to do, or someone to be; it also makes sense to praise, blame, reward, and punish them for their voluntary choices and actions. We certainly should be careful to ascertain that people are not acting from uncontrollable compulsions or constraints before we assign praise or blame to them. Having ascertained that they have acted in freedom, then, it does make sense to talk of moral responsibility and its attendant rewards and punishments.

IV. Summary.

In the preceding discussions, we have found that, although desert cannot be the only standard governing a just distribution, it is an extremely important criterion, indeed, an essential one. It is the only basis of just distribution which is necessarily and inherently connected with, and justified by, moral praise for the action of a particular person.

A valid conception of desert must assume the view of a person as an autonomous moral individual, and rewarding according to effort rather than contribution can eliminate or reduce the impact of uncontrollable natural endowments or the social elements of luck and chance. We reward for desert-for-effort because we believe that what a person has done was under his or her control and that it was socially valuable.

This theory of justice as desert appeals to the view of human freedom since only a free moral agent can bear a moral responsibility. J. R. Lucas has asserted likewise. Only if people are free, are they responsible for their actions, and their actions are the chief constituent of their deserts. Although there are other bases than desert for determining how people ought to be treated, desert is preeminent. People ought to be done by according to how they deserve, and how they deserve depends on how they have done, which in turn presupposes responsibility and freedom. (See Lucas, 1980: 197)

But meanwhile we must be ready to acknowledge a severe criticism that distribution according to desert involves an enormous difficulty in practical application because the grounds of desert are not always easily to be measured, weighed, and balanced one against the other. There is also a perplexing problem to isolate particular parts of human characteristics and find out to what degree a person's actual conduct and possessed quality is a result of his conscious effort rather than of innate endowments or environmental impact. This problem is quite a complicated one because those different factors that shape human characteristics are not distinct and unchanging but rather they mutually interact and influence each other.

However, notwithstanding the deficiencies in measurement and knowledge with regard to the principle of desert, we should not over-estimate these problems. When an appraisal based on moral judgment is made, there is some room for uncertainty and doubt but it does not follow that the

actions based on such an appraisal are always unjustified. In distributive justice based on desert, one has to compare efforts of different types, rank them and compare them with the corresponding rank of standardized rewards. Most of these moral judgments would incorporate appraisals both of kind and of degree.

Hitherto, we have examined only the basic concept of desert, criteria of desert, and relationship between free will and desert. The remaining questions which require further pursuit in order to build a comprehensive idea of desert and justice are as follows:

First, why do we select a notion of desert as a most essential criterion of justice? On what basis can we legitimately defend the substantive principle of desert-for-effort as a theory of social justice? And furthermore what are the proper grounds for deriving principles of just distribution of benefits and burdens? These are the questions of justification of the idea of justice as desert. I will examine the relevant theories of moral and legal reasoning and justification for the answer to these issues.

Secondly, as we have acknowledged that a notion of desert is not the sole criterion of justice though it is the principal one, we should explore other relevant criteria such as utility and needs and examine what are the relationship among those different, sometimes conflicting, criteria.

Thirdly, it will be explored how far the principle of desert, and the principle of equilibrium of benefits and

burdens are also useful in the analysis of just punishment.

Finally, another important issue to be investigated more deeply is what are the general principles of justice and moral justification in traditional Korean thoughts in light of the development of Confucianism. The aim of this investigation is to bridge the gap between the Western-implanted ideas of justice and law and the traditional Eastern counter-ideas of justice and law. An approach to synthesize both ideas in a harmonious way is, I have come to see, a crucial task for the students of jurisprudence.

CHAPTER 2. DESERT AND TRADITIONAL RETRIBUTIVISM

I. Overview and definition.

I.1 Overview.

If, as we have discussed in the previous chapter, the balance of benefits and burdens is to constitute an essential framework for social justice, this may be applied not only to the distribution of goods (in order to balance the increased amount of burdens) but also to the distribution of punishments (to balance the undeserved benefits gained by a criminal). Here the problem of criminal justice can be seen as the converse case of that of economic justice since there is a general symmetry between the justification of reward (that is, based on good desert) and that of punishment (that is, based on bad desert), though this symmetry is not a perfect one. (See Fuller, 1969: 30)

Hence in this and next three chapters I shall deal with the problem of punishment as a consequence of bad desert, its definition and competing theories of its justification. Backward-looking theories of retributivism, forward-looking theories of utilitarianism, and compromising theories of teleological retributivism will be compared and examined, thereafter, my own version of a 'teleological desert theory of punishment' will be proposed.

A vast amount has been written on the aims and justification of criminal punishment probably because, as a political institution devoted to the infliction of pain

on human-beings, it has never sat easily on the conscience of civilized people. Insofar as blame can be construed as a 'kind of verbally mediated punishment', (Stevenson, 1944: 307) the various traditional theories of the nature and justification of punishment find their counterparts in discussions of blame.

As Philip Bean points out, justifications have to be found in the quality of the argument, which in this case is a moral one. The position adopted depends therefore on the type of questions to be asked. "How can punishment be justified?" is a moral question. "How effective are punishments?" is a different question. (See Bean, 1981: 2) Here I shall be concerned primarily with the moral question.

The traditional debate among philosophers over the justification of punishment has been between partisans of 'retributive' and 'utilitarian' theories. Neither the term 'retributive' nor the term 'utilitarian' has been used with perfect harmony and precision, but some variations to them and even compromising attempts between them have been made.

Theories of punishment can be classified very roughly as follows. (See Feinberg 1978: 418; Ezorsky, 1972b: xi)

(i) Retributive theories. Retributivists claim that the primary justification of punishment is always to be found in the fact that an offense has been committed which deserves punishment, not in any future advantage to be gained by its infliction. Two versions of the theory should be distinguished: a moralist version (classical retributivism), which maintains that the proper function of

punishment is to inflict on the offender the pain 'called for' or deserved by the moral gravity of his offense; and a legalistic version (Mabbott), which holds that the justification of punishment is always to be found in the fact that a rule has been broken, for the violation of which a certain penalty is specified - whether or not the offender incurs any moral guilt. This retributive theory is not to be confused with the vindictive theories that vindictive satisfaction in the mind of the beholder is the ultimate justification of punishment, for retributivism's proponents have been among the leading enemies of vengeance.

(ii) Utilitarian theories. These theories espoused by consequentialists hold that punishment is at best a necessary evil, justifiable if and only if the good of its consequences (its 'social utility') outweighs its own immediate and intrinsic evil. Punishment is pain or deprivation inflicted on a person, presumably a wrongdoer, for the sake of such future goods as correction or reform of the offender, protection of society against other offences by the same offender, and especially deterrence of other would-be offenders through the threat of penal sanction.

(iii) Vindictive theories. Vindictive theories make much of the unhappy fact that, when harmful wrongs are committed, there is among men a widespread and natural desire for vengeance. Such theories are of three different kinds. Firstly, the escape-valve version, associated with the names of James Fitzjames Stephen and Oliver Wendell

Holmes, Jr., and currently in favour with some psychoanalytic writers, holds that legal punishment is an orderly outlet for aggressive feelings, which would otherwise demand satisfaction in socially disruptive ways. The prevention of private vendettas through a state monopoly on vengeance is one of the chief ways in which legal punishment has social utility. The escape-valve theory is thus easily assimilated by the utilitarian theory of punishment. Secondly, the hedonistic version finds the justification of punishment in the pleasure it gives people, particularly the victim of the crime and his loved ones, to see the criminal suffer for his crime. This version of the vindictive theory is subsumable under the utilitarian rubric. Finally, the emotional version of the theory, very popular among the uneducated, holds that the justification of punishment is to be found in the emotions of hate and anger it expresses, these emotions being those allegedly felt by all normal or right-thinking people. This theory holds that certain emotions and the actions they inspire are self-certifying, needing no further justification. It is therefore not a kind of utilitarian theory and might even be classified as a variety of retributivism, although in its emphasis on feeling it is in marked contrast to more typical retributive theories that eschew emotion and emphasize proportion and desert. (See Feinberg and Gross, 1986: 593)

A similar kind of 'sentimentalist' theory can be found in Adam Smith's contention that the practice of punishment develops from feelings of resentment and the desire to

retaliate. The justification of punishment from feelings of resentment, according to Smith, depends on the sympathetic approval of an impartial spectator. (See Raphael, 1980: 167) Punishment is in effect defined in terms of and limited to the extent of, victim's reasonable resentment (judged via the ideal spectator test); this reasonable resentment is publicly endorsed and fulfilled by the act of punishment (note the implied communicative force of punishment).

(iv) Expressive theories. Similarly to vindictive theories but with a greater emphasis on expressive functions, expressive theories hold that the justification for punishing an offender is that doing so expresses an important statement about the offence. Typically, Feinberg points out four ways in which punishments function expressively: (a) Authoritative disavowal: it is common international practice for a country which believes that its rights have been violated by an agent of another country to ask that country to punish him. By doing so that country disavows the violation. (b) Symbolic non-acquiescence: "Speaking in the name of the people." This symbolic function of punishment explains why even those sophisticated persons who abjure resentment of criminals and look with small favour generally on the penal law are likely to demand that certain kinds of conduct be punished when or if the government with some purpose of legal policy in regard of those conducts tends to treat them in a lenient or a permissive way. (c) Vindication of the law: if the criminal law forbids something, then to leave unpunished a person who has infringed it gives rise

to doubts that the law really means what it says. Feinberg's example is the refusal of juries in Mississippi to convict white men who kill blacks. (d) Absolution of others: when something scandalous has occurred and it is clear that the wrongdoer must be one of a small number of suspects, then the state, by punishing one of these parties thereby relieves the others of suspicion and informally absolves them of blame. (See Feinberg, "The Expressive Function of Punishment," in 1970: 101-5)

(v) Teleological retributive theories. Teleological retributivists make recourse to a plurality of principles. (See Ezorsky, 1972b; this term 'teleological retributivism' is also used by Robert Nozick. See 1981: 371-4) Thus they share with utilitarians the notion that penal laws should yield some demonstrable beneficial consequences. Justice is not served by the infliction of deserved suffering for its own sake. But they derive the following view from retributivism: justice is served if teleological aims are held in check by principles of justice, e.g. that the suffering of punishment should not exceed the offender's desert.

I shall consider the merits and the demerits of these five perspectives on punishment. Here my purpose is to espouse a 'teleological desert theory of punishment' which belongs to the composite theories of teleological retributivism but is distinct from other conventional theories in that group. I shall try to propose an integrative approach to punishment which strikes a compromise between differing theories, bringing elements of

them together into a complete account. My claim will be that in the practice of punishment we should take into consideration both the notion of wrongdoer's desert and the goals to be served by punishing him. Since the person as a moral agent is perceived as an on-going, changeable being in the flow of time from past over to future, any attempt to ascribe his moral responsibility to his moral character will not be properly done without having a whole-life-view of his self. Thus the particularistic approaches - the backward-looking only retributive theories and the forward-looking only utilitarian theories - will not be taken as defining a proper approach to punishment.

Here, about the problem before us as about any or almost any ethical problem, there are two questions to be asked: (i) What good is done by punishment and reward? (ii) When and how ought punishment to be inflicted and reward bestowed? The two are, however, so connected that the answer to the first provides at least the most important datum required if the second is to be answered satisfactorily. It is indeed natural and common to go further and say that the answer to the second is totally dependent on the answer to the first, that the amount of good produced ought to be the sole and sufficient premise and criterion in determining what it is right to do. (For this point, Ewing, 1929: 2) My two-stage justification of reward and punishment will comprise two questions, namely the question of justice and the question of the common good. The notion of the good which is central to the full justification, I shall consider later in due course. (See

I.2. A Working Definition of Punishment.

Before entering into the great debate it is worth examining definitions of punishment. As Philip Bean points out, definitions provide a boundary and shape to the subject matter. They do not provide arguments about justifications, for these involve normative relationships which require separate analysis. (Bean, 1981: 7) None the less, some philosophers have wanted to show that the justification for punishment rests on its definition. For example, some retributivists suggest that definitions of punishments imply deserts. (See Mabbot, 1939: 152-3) Retributivists are not alone in arguing that definitions of punishment relate to its justification. Rule-utilitarians such as Rawls in his earlier writings have argued on similar lines. (See Rawls, 1955: 12)

The word 'punishment' is used in many different contexts - juridical, religious, moral, pedagogical, natural (excessive eating brings its own punishment) - with shifting meanings, but nevertheless in such a way that there always appears to be some 'family resemblance' (Wittgenstein's parlance) between the various senses. Therefore it will be useful, following Antony Flew to establish (more or less arbitrarily) a central meaning, defined by means of a number of characteristics, and then locate other meanings as variants or derivatives in relation to it, as particular characteristics drop out as unnecessary, or have to be added.

Punishment in Flew's terms has five defining elements.

(See Flew, 1974: 291)

(i) It must involve an evil, an unpleasantness to the victim. This is self-explanatory, although Flew, following Hobbes, prefers terms like 'evil' and 'unpleasantness' to the more stark words such as 'pain'; the former avoids suggestion of flogging or forms of torture.

(ii) It must be for an offense, actual or supposed. This too is self-explanatory, although Flew is careful to tie down his definition by emphasizing the offence. So, for example, he says that a term spent in an old-fashioned public school, although doubtless far less agreeable than a spell in a modern prison, is not punishment - unless, of course, the child was sent there as a result of his offending behaviour.

(iii) It must be of an offender, actual or supposed. By insisting that punishment is directed to an offender, Flew makes a logical connection between the evil, the offence and the sufferer. In his view we cannot then logically punish the innocent.

(iv) It must be the work of personal agencies. Put another way, punishment must not be the natural consequences of an action, for Flew wants to argue that evils occurring to people as the result of misbehaviour but not by human actions are not punishments but penalties. Thus unwanted children and venereal disease (or, nowadays, AIDS) are penalties of, but not the punishment for, sexual promiscuity.

(v) It must be imposed by authority conferred through or

by the institutions against the rules of which the offence has been committed. Here Flew is following Hobbes, who argues that evil inflicted by anyone, even a public authority acting without preceding condemnation, is not to be styled by the name of punishment but as a hostile act (See Hobbes, 1904: 225-6). Similarly, direct action by an aggrieved person with no pretensions to special authority is not properly called punishment. It may be revenge, as in vendetta, or it may, in Hobbes's terms, be an act of hostility, but it is not punishment.

Following mainly Flew, H. L. A. Hart, however, uses five modified elements to fix the word's central meaning. Punishment must: (i) involve pain or other consequences normally considered unpleasant; (ii) be for an offence against legal rules; (iii) be of an actual or supposed offender for his offence; (iv) be intentionally administered by human beings other than the offender; and (v) be imposed and administered by an authority constituted by the legal system against which the offence is committed. (See Hart, 1968: 4-5; see also Loftsgordon, 1966: 341 et seq.)

A number of criticisms have been directed at Hart's modified definition. One relatively minor point is that it seems arbitrary to treat punishments inflicted for breaches of nonlegal rules as 'sub-standard', in the way that Hart does. (See Sverdlik, 1988: 180) A punishment inflicted by a parent or school principal seems to be fully and unequivocally an instance of punishment. (See Wasserstrom, 1980: 147, n.4)

There are much more serious criticisms that can be directed at Hart's definition. The first comes from Joel Feinberg. Feinberg asserts that Hart's definition cannot distinguish between what he calls (mere) 'penalties' and punishment properly so called. Penalties like parking fines, or yardage granted to a football team by a referee, satisfy Hart's five conditions but would not normally be considered punishment, according to Feinberg. (See Feinberg, 1970: 95-118, esp. 95-101) There is a further feature characteristic of punishment proper that Feinberg calls its 'condemnatory' aspect. (Ibid.) Precisely with this aspect of punishment as condemnation, Neil MacCormick argues that "it is a mode of attaching conventionally understood degrees of reprobation to offences, judged both by the flagrancy of the offence and the importance of the values attacked." (1981: 141)

Alf Ross also argues, that the punitive measure must be an expression of disapproval of the violation of the rule, and consequently of censure or reproach directed at the violator. (See Ross, 1975: 36; For an 'expressive' character of punishment, see also Skillen, 1980: 509-23) According to Ross's account, it is simply a logical impossibility to enforce a normative system, that is, give effect to its normative requirements, without at the same time giving expression to disapproval. Disapproval is an act of thought which in itself need not be communicated to others. When it is communicated to a violator it is called censure or reproach. In that case it is not an act of thought alone, but act of communication with a certain typical effect, in

this case precisely that of conveying feelings of disapproval and attitudes of a generally dissociative, unbenevolent, and even positively hostile character. (Ibid., p.37) Reproach is, as Alf Ross asserts, therefore not merely a moral judgment that is passed on someone, it is at the same time itself a sanction; reproach brings suffering, or at least a measure of unpleasantness, to the person at whom it is directed. When further suffering is inflicted upon the violator in the form of punishment in the legal sense, this additional suffering may be understood as being experienced by the members of the community as much as by the violator himself, as an amplification of the hostility already conveyed in the expression of disapproval. (See *ibid.*, 37-38)

Then what is a practical advantage in admitting disapproval and reproach along with suffering as part of the definition of punishment? For it is precisely by means of these characteristics that punishment is to be distinguished from other social responses to law violators, that is from what goes by the generic name of 'treatment'. Punishment is of course a form of treatment too, in the everyday sense of the word. As a term in criminology 'treatment' is used in a narrower sense for something that is to be distinguished from 'imposition of penalties', and this distinction consists precisely in treatment in this sense of the term being intended neither as the infliction of suffering nor as the expression of disapproval, but only - just as in treating a case of pneumonia - as an attempt to bring about a desirable change in the state of the

individual's psycho-physical organism. As an example of pure treatment we may think of the imaginary case where a person who feels criminal tendencies of some kind welling up inside him reports to a clinic in order to have the appropriate pills prescribed for their removal.

If it is difficult in practice to keep this distinction between penalty and treatment clear, this is due to the fact that the forms of treatment available today involve restrictions upon the "patient's" freedom or other kinds of interference, and are therefore experienced as suffering or unpleasantness - which, as we know, may assume proportions in excess of that of regular punishment. In practice, therefore, the distinction between punishment and treatment must be based on whether or not an element of disapproval with condemnation is involved. (See Ross, 1975: 38)

In accordance with the above considerations and modifications, the concept of punishment could be defined in terms of six criteria for the use of the word in its primary sense, i.e. six conditions satisfied by an ordinary or standard case to which the word would be applied: (i) it must be for an offence, actual or supposed; (ii) it must be of an actual or supposed offender for his offence; (iii) it must be the work of personal agencies (i.e. not merely the natural consequences of an action); (iv) it must involve suffering or at least other consequences normally considered unpleasant; (v) it must be imposed by authority (real or supposed), conferred by the system of rules against which the offence has been committed; and (vi) it must be an expression of condemnation and disapproval of

the offender.

This should not be regarded as a comprehensive and satisfactory definition. The proposed definition is, however, adequate for the problem we are posing, despite any inability to account for distinctions which might be significant in another context. Based on the above definition of punishment, I shall proceed to discuss the issues of its justification.

II. Traditional Retributive Theory and Desert.

II.1. Retributivism.

There is no complete agreement about what sorts of theories are retributive except that all such theories try to establish an essential link between punishment and moral wrongdoing. Here I shall focus on the different retributive reasons for punishment. Although I take retributive theories to be essential to any account of just punishment, upon examining the various versions of those theories I shall conclude that they are all deficient in one way or another. Even the most plausible of them underdetermines the case for punishment and requires support from non-retributive considerations.

Typically the retributive theory of punishment involves two main conceptions: (i) that it is an end-in-itself that the guilty should suffer pain; (ii) that the primary justification of punishment is always to be found in the fact that an offence has been committed by virtue of which the offender 'deserves' the punishment, not in any future

advantages to be gained by its infliction, whether for society or for the offender as an individual. The second conception, it is argued, involves the first, for, if punishment is not an end-in-itself, it is justifiable only as a means to other ends, and therefore, cannot be defended by simply referring to a past act, since the ends to be attained cannot now be attained in the past but only in the future. It is admitted by all parties that in general any future ends which a punishment may have can only be achieved if it is inflicted on 'the guilty', i.e. on those who deserve it, but this is not what the retributive theory essentially means. It means that the punishment of the guilty is in itself something of value quite apart from the fact that it is a method of attaining other ends, like the deterrence or reformation of offenders.

This theory seems to be supported by the authority of some of the greatest philosophers of modern times, especially Immanuel Kant, and in a less extreme form F. H. Bradley and probably G. W. F. Hegel. (Not, however, according to the interpretation given by, e.g., J. E. McTaggart in his *Studies in Hegelian Cosmology*, 1918: 24-5) Bradley insists that there is a necessary connection between punishment and guilt. No person is to be punished unless he deserves it, and he deserves punishment because he has been guilty of doing wrong. "Punishment is the denial of wrong by the assertion of right," says Bradley (1927: 27); or "Punishment is the complement of criminal desert; it is justifiable only so far as deserved and further is an end in itself." (Ibid.) Bradley's position

contrasts with that of the utilitarians, who see punishment as a means to an end and not an end in itself. John Stuart Mill, for example, said, "there are two ends of punishment: the benefit of the offender himself, and the protection of others." Bradley would not agree, for Mill would be seen as using punishment to secure another ethical end, namely social utility, whereby the offender becomes a means to attaining that.

Now when Bradley insists on a necessary connection between punishment and guilt, he is stating one of the strongest arguments in favour of retribution, because he is arguing that only the guilty are to be punished and that guilt is a necessary condition of punishment.

II.2 Kant's theory.

With this background we can now turn to a positive account and examination of the doctrine of Immanuel Kant, who is the paragon of classical retributivists. Many writers in fact identify retributivism with his view. Thus, it is essential to clarify Kant's employment of the notion of desert and its rationale before we understand the demand of retributivism and the significance of desert in contemporary debates of criminal justice. Kant maintained both the position that there is a duty to punish someone who is culpably guilty of having committed a crime (Golding names this position as 'maximal retributivism', see Golding, 1975: 90) and the position that the punishment should equal the gravity of the offence. The following two well-known quotations give the flavor of his theory:

Even if a civil society resolved to dissolve itself with the consent of all its members - as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves through the whole world - the last murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realise the desert of his deeds, and the bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice. (Philosophy of Law, trans., W. Hastie, 1887: 198, Part Second)

...Punishment can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of real right [i.e., goods or property]. Against such treatment his inborn personality has a right to protect him, even although he may be condemned to lose his civil personality. He must first be found guilty and punishable, before there can be any thought of drawing from his punishment any benefit for himself or his fellow citizens. (Ibid. 195)

These passages make it quite clear that forward-looking considerations, such as deterrence and reform, are quite irrelevant to whether and how much punishment ought to be inflicted on a lawbreaker. There are two main points in above passages to which we should give particular attention: (i) The only acceptable reason for punishing a man is that he has committed a crime; (ii) Whoever commits a crime must be punished in accordance with his desert.

What makes Kant hold this position? Why does he think it apparent that consequences should have nothing to do with the decision whether, and how, and how much, to punish? There are two directions an answer to this question might follow. (See Pincoffs, 1966: 5-6)

One would lead us into an extensive excursus on the

philosophical position of Kant, the relation of this to his ethical theory, and the relation of his general theory of ethics to his philosophy of law. It would, in short, take our question as one about the consistency of Kant's position concerning the justification of punishment with the whole of the Kantian philosophy. This would involve discussion of Kant's reasons for believing that moral laws must be universal and categorical in virtue of their form alone, and divorced from any empirical content; of his attempt to make out a moral decision-procedure based upon an 'empty' categorical imperative; and, above all, of the concept of freedom as a postulate of practical reason, and as the central concept of the philosophy of law. This kind of answer, however, we must forego here; for while it would have considerable interest in its own right, it would lead us astray from our purpose, which is to understand as well as we can the retributivist position.

We want to take another direction, then, in our answer. Is there any general reason why Kant rejects consequences in the justification of punishment? Kant dislikes paternalism above all else and sees in the utilitarian position a method of treating people as means to an end rather than as ends in themselves. Kant sees crime as an intentional transgression - that is an act accompanied with the consciousness that it is a transgression. (See *Prolegomena, General Divisions of the Metaphysic of Morals, IV.*, in W. Hastie, 1887: 38-9)

In another passage that is again worth quoting, he makes a related point:

Now the notion of punishment, as such, cannot be united with that of becoming a partaker of happiness; for although he who inflicts the punishment may at the same time have the benevolent purpose of directing this punishment to this end, yet it must be justified in itself as punishment, that is, as mere harm, so that if it stopped there, and the person punished could get no glimpse of kindness hidden behind this harshness, he must yet admit that justice was done him, and that his reward was perfectly suitable to his conduct. In every punishment as such there must first be justice, and this constitutes the essence of the notion. Benevolence may, indeed, be united with it, but the man who has deserved punishment has not the least reason to reckon upon this. (*Critique of Practical Reason*, trans. L. W. Beck, 1956: 149)

This passage is remarkable in many respects, not the least in the link with justice. The phrase "get no glimpse of kindness hidden behind the harshness" may have contributed to the belief that retribution was vindictive, but to Kant it is a way of restating the point that punishment is deserved. It is also a way of stating that the criminal is not being punished for his own good. If he does not deserve it we have no right to inflict it and, according to Kant, no right to inflict it in the name of some good of which the criminal may or may not approve. The criminal must be treated as a rational being, and rationality bestows dignity. We cannot force our judgements upon him or appeal to good consequences, for among other things the criminal may reject the means and the ends of those judgements. (See Bean, 1981: 27)

We can now see why Kant maintains that it is unjust to punish the innocent and just to punish the criminal. These are not mere matters of moral intuition but are consequent upon his theory of rights, justice, and law. The keynote of Kant's thought is the idea of freedom and the conditions

under which coercion is justified. Men, as free beings, have the right to realize their freedom in action. This in turn requires that each should in his actions respect the rights of others, for no one can in fairness claim a right to act on the basis of his own free choice unless he concedes a similar right to others. Rights, we may say, are persons' legitimate freedoms. Meanwhile punishment is in fact characterized as a one-sided use of coercion and involves a deprivation of at least some rights. Now, we owe it to a person to respect his rights in our actions as he owes it to us in his. But punishing an innocent person - that is, a person who stayed within the bounds of legitimate freedom - is manifestly a violation of this reciprocal debt: it is a violation of justice and unfair to him. Justice requires that persons be treated equally in regard to their rights unless there are morally relevant differences between them. (See Golding, 1975: 90-2)

On the other side, a crime exceeds the perpetrator's legitimate freedom and infringes on the rights of others, thus exhibiting disrespect for them and their rights. In knowingly breaking the law, the criminal in effect declares that he has a licence to steal, for example, and he puts everyone who would respect property rights at a disadvantage. The criminal weakens the fabric of justice. He must be punished as a matter of re-asserting the laws of freedom he has transgressed. He should not be allowed to profit from his wrongdoing. Condemnation, by itself, is insufficient. Failure to punish is not only condonation of unjust acts - in effect, a declaration of their

permissibility - but is also unfair to those who practise self-restraint and respect the rights of others in their actions. Crimes are moral wrongs and they deserve punishment. (See Ibid., 92-3)

The above account, I think, embodies the main lines of the theory behind Kant's retributivism. Crucial to it is the conception of crime as a violation of rights. Coherent and persuasive though an appeal Kant's retributive theory may be, I believe some of his arguments, particularly the abstract claim of primacy of freedom and justice, are too rigorous to be applicable in practical matters. For example, Kant's argument that punishment for the offender's own good is treating him as a means is less persuasive even from the viewpoint of teleological retributivism. Thus, I shall take Kant's idea of desert only in a limited value.

II.3. Hegel's Theory.

There is another retributive theory espoused by Hegel. Hegel's version of this rationale has attracted more attention, and disagreement, in recent literature. It is the Hegelian metaphysical terminology which is in part responsible for the disagreement, and which has stood in the way of an understanding of the retributivist position. The difficulty turns around the notions of 'annulment of crime', and of punishment as the 'right' of the criminal. Let us consider 'annulment' first. We find Hegel's contention quoted as follows:

If crime and its annulment... are treated as if they were unqualified evils, it must, of course, seem quite unreasonable to will an evil merely because "another

evil is there already." ... But it is not merely a question of an evil or of this, that, or the other good; the precise point at issue is wrong, and the righting of it... The various considerations which are relevant to punishment as a phenomenon and to the bearing it has on the particular consciousness, and which concern its effects (deterrent, reformatory, etc.) on the imagination, are an essential topic for examination in their place, especially in connection with modes of punishment, but all these considerations presuppose as their foundation the fact that punishment is inherently and actually just. In discussing this matter the only important things are, first, that crime is to be annulled, not because it is the producing of an evil, but because it is the infringing of the right as right, and secondly, the question of what that positive existence is which crime possesses and which must be annulled; it is this existence which is the real evil to be removed, and the essential point is the question of where it lies. So long as the concepts here at issue are not clearly apprehended, confusion must continue to reign in the theory of punishment. (See Hegel, *Philosophy of Right*, trans., Knox, 1942: 69-70)

All this, of course, is obscure. Marriages, considered as contract, can be annulled, but crimes cannot be, in any ordinary sense. My death or imprisonment, after I have killed a man, does not make things what they were before. In what way can my death or imprisonment be seen as an annulment? Hegel's argument begins from a conception of moral principles, such as the principle against taking another's life except, as we say, in certain circumstances. An act of murder is not merely a contravention of this principle but also a denial of its rightness. Such a denial is said to 'infringe' the principle. We must 'restore' it and this can be done only by punishing the offender. (See Honderich, 1984: 45)

Thus it would be unjust, says Hegel, to allow crime, which is the invasion of a right, to go unrequited. For to allow this is to admit that crime is 'valid': and this is

to attack the right itself. The system of justice in which there are rights must be respected. Punishment not only keeps the system in balance, it vindicates the system itself. This argument seems to bring us closer to the basically Kantian heart of Hegel's theory. (See Pincoffs, 1966: 11)

To reproduce this doctrine more faithfully and intelligibly would require a considerable and tedious excursus into the philosophy of Absolute Idealism. The doctrine, incidentally, has found a home elsewhere as well, in a tradition of English judicial thought. James Fitzjames Stephen, the Victorian judge and law historian, finds a justification of punishment in its 'ratification' of a morality which has been violated. (See Stephen, *A History of the Criminal Law of England*, 1883: Vol.II, Chap. XVII, 'Of Crimes in General and of Punishments', reprinted in Feinberg and Gross, 1975: 45) Lord Denning has observed that "the ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime." (HMSO, Report of the Royal Commission on Capital Punishment, s.53, quoted in Hart, 1968: 170)

A second part of Hegel's account of punishment concerns the 'rights' of offenders to be punished. One line of argument proceeds from the assumption that men are in some part of themselves rational. They recognized the supposed obligation to punish offenders, presumably the supposed obligation based on the need to restore a principle of right. They recognize this obligation even if they are

offenders. They have a right, furthermore, to be enabled to fulfil this obligation. So we must punish them. (See Honderich, 1984: 47) The obvious reaction to this would be that it is a strange justification of punishment which makes it someone's right, for it is at best a strange kind of right which no one would ever want to claim. However, this part of Hegel's doctrine, incidentally, like the first part, continues to find supporters. For an example: "If we respect personality," we are told, "we must respect responsibility. If we respect responsibility, we must respect the right of offenders to be punished for their offences." (See Barker, 1951: 179)

III. Summary.

Before moving to contemporary discussions, let us sum up traditional retributivism as we have found it expressed in the paradigmatic passages we have examined.

(i) The only acceptable reason for punishing a man is that he has voluntarily committed a crime.

(ii) The only acceptable reason for punishing a man in a given manner and degree is that the punishment is 'equal' or 'equivalent' to the crime.

(iii) Whoever commits a crime must be punished in accordance with his desert.

To these propositions should be added two underlying assumptions:

(i) An assumption about the direction of justification: to the criminal.

(ii) An assumption about the nature of justification: to show the criminal that it is he who has willed what he now suffers.

Although traditional retributivists insist on treating the offender as a moral agent, it can be argued that there is no proof that treatment of a person as a moral agent does necessarily lead to retributive punishment. To say that punishment is an end or a good in itself can only be established by the argument of intuition, or be seen as self-evident. But the very claims to such intuition or to self-evidence are weakened by the fact that they are so strongly contested.

And the key concept of 'desert' in above discussions appears intolerably vague. What does it mean to say that punishment must be proportionate to what a man deserves? This seems to imply, in the theory of the traditional retributivists, that there is some way of measuring desert, or at least of balancing punishment against it. How this measuring or balancing is supposed to be done, I shall discuss later. What we must recognize here is that there are alternative ways to understand criteria of 'desert', as can be found in contemporary retributivism, and that it is not always clear which of these the traditional retributivist means to imply.

CHAPTER 3. DESERT AND CONTEMPORARY RETRIBUTIVISM

Contemporary retributivists treat the notion of desert as central to the retributive theory, punishment being justified in terms of the desert of the offender. Retributivists base their assessments of desert both on the harm done by the act, and on the mental state of the offender which determines his culpability. To be deserving of punishment the offender must be morally culpable in that his act was done in the absence of one of the accepted excuses. These excuses usually include duress, accident, reasonable mistake, and some forms of mental illness. For convenience we shall use the term 'voluntary' conduct to refer to all those acts for which no excuse was available, and for which therefore a normal agent can be held morally culpable. We can then formulate retributive theories of punishment as those theories which maintain that punishment is justified because the offender has voluntarily committed a morally wrong act. Is this claim to be accepted as self-evident, or can it be supported by other considerations? How can punishment, which involves the deliberate infliction of suffering or deprivation, be justified even when it produces no good consequences such as the deterrent, reformatory, and incapacitative effects which utilitarians stress? (For an interesting discussion of some recent versions of retributivism, see Honderich, 1984: 212-44, Postscript)

In defending the claim, retributivists divide sharply into two groups, namely, those with a non-comparative

notion of desert and those who espouse a comparative notion of desert. (See Ten, 1987: 47) The former group have tried to justify punishment on the ground that wrongdoers deserve to suffer. This appeals to a non-comparative notion of desert in which what a person deserves depends solely on what he or she has done. But the latter group relies on comparative notions of desert, connecting punishments with more general principles of distributive justice or justice in the distribution of the benefits and burdens of social life. The offender's interests are compared respectively with those of other groups in society: The victims of crime, other offenders, and the law-abiding citizens. From now on I shall examine the contemporary arguments for retributivism by considering first the view that wrongdoers deserve to suffer. My aim is to discern the most plausible reasonings for a deserved punishment from the various arguments.

I. Intrinsic Retributivism.

A contemporary definition of retributive punishment reads, for example, as "punishment meted out because it is deserved." (See Golding, 1975: 89) Similarly, Honderich points out that to give as a reason for the rightness of punishment that it is deserved by offenders is retributivism. (See Honderich, 1984: 9) John Kleinig also suggests that, "The principle that wrongdoers deserve to suffer seems to accord with our deepest intuitions concerning justice." (Kleinig, 1973: 67) To support this

claim, Kleinig cites the example of a Nazi war criminal who escapes to an uninhabited island where 30 years later he is found leading 'an idyllic existence'. While he is still unrepentant for what he has done, he has no desire to cause further harm. (Let us also assume that his punishment would have no general deterrent effect on the behaviour of others.) Kleinig thinks that the Nazi would not be justified in complaining if suffering were imposed on him for his past misdeeds, although he concedes that it is another question as to whether it would be proper for the state to inflict the suffering on him.

Kleinig's view of the Nazi can be widely shared, but it is unclear what the source of the shared belief that the Nazi ought to suffer is. In many people it may be based on the desire for revenge rather than on the claim of justice. But even when it is based on considerations of justice, it may well rest, as C. L. Ten rightly points out, on a notion of comparative justice rather than on the non-comparative judgement that wrongdoers deserve to suffer. (See Ten, 1987: 47)

Intrinsic Retributivism in assertion of its peculiar intrinsic good is strongly reminiscent of the doctrine of moral intuitionism, to the effect that there are moral properties which are open to some kind of moral perception. From this viewpoint, then, it remains possible or anyway conceivable that it will be maintained that anyone who does not somehow see the intrinsic goodness of the suffering of the guilty is failing in moral perception, is a victim of moral blindness. Presumably it will also be maintained that

some other people who claim the existence of different intrinsic goods are in the grips of moral hallucination. Then it will be necessary for the proponents of this view to maintain, incidentally, that those of us who are blind in the given way are not blind to one thing, but to a host of them.

What is to be said briefly in reply to any supposition of the moral blindness of many of us is that there are great difficulties in any theory or account of moral perception or intuition, and hence of moral blindness, hallucination and so on. Thus I can conclude that intrinsic retributivism, notwithstanding its *prima facie* probative force deriving from intuition, might as a result of further thought come to provide an insubstantial and obscure reason for punishment. (See Honderich, 1984: 214; see also L. H. Davis, 1972: 140. Davis makes it clear that he does not think that this intuition can provide, by itself, a sufficient justification for a system of punishment.)

II. Satisfaction Theory.

Another reason why some people think that the Nazi war criminal should be punished is that his punishment brings satisfaction to others. This view has been called the 'satisfaction theory', (The label is given by John Cottingham, see his article "Varieties of Retribution", 1979: 241-2) and it is said to be a view that has given force to retributivism. (See Honderich, 1984: 28) The idea behind the claim seems to be that there should be some kind

of reciprocity between the sense of grievance felt by the victim of an offence and the satisfaction he gets from the suffering of the offender. What connection, if any, does this theory have with our 'basic' sense of retribution? The answer, according to John Cottingham's account, hinges on which of two possible interpretations is given to the theory. (Cottingham, 1979: 242)

(i) On the first interpretation, the claim put forward is that it is intrinsically desirable or appropriate that grievances of victims should be matched by suffering of offenders. There is a close link here with retribution as repayment. If child A hits child B causing him pain and a sense of grievance, child B will frequently be heard to say, "I will make you pay for that!" The payment is felt to have been exacted once B has inflicted a similar hurt on A. (Such beliefs are by no means confined to children, but children tend to make them more explicit.)

Unfortunately for this version of the satisfaction theory, it is far from clear how the indubitable psychological facts just cited are capable of providing a satisfactory moral justification for the practice of punishment. We can see a useful distinction made by Nozick between the typical case of retributive punishment and a desire of revenge with which it is sometimes confused. (See Nozick, 1981: 363-97) (a) "Retribution is done for a wrong, while revenge may be done for an injury or harm or slight and need not be for a wrong." (Ibid., 366) He gives an example of the distinction between a wrong and a harm by pointing out that even if the rejected suitor is harmed, no

wrong has been done because the rejector had a right to reject. (Ibid., 388) (b) "Retribution sets an internal limit to the amount of punishment, according to the seriousness of the wrong, whereas revenge internally need set no limits." (Ibid., 367) This is certainly true as often the person seeking revenge harms his victim until he is satisfied, and he may not be satisfied until he has inflicted much greater harm on the victim than had been inflicted by the victim on him or his loved ones. (c) "Revenge is personal." (Ibid.) It is in the sense that the revenger is the very person on whom the harm to be avenged has been inflicted, or he has a personal relationship with the person harmed. On the other hand, the dispenser of retributive punishment need not have any such personal tie with the victim of the wrongful conduct. (d) "Revenge involves a particular emotional tone, pleasure in the suffering of another", (Ibid.) which is missing in the case of typical retribution. This, according to Nozick, explains why the revenger often wishes to witness the suffering of the revengee.

(ii) A second, and more sophisticated, version of the satisfaction theory is put forward by the Victorian judge James Fitzjames Stephen: "The criminal law regulates, sanctions and provides a satisfaction for the passion of revenge". (See Stephen, 1890: 99) If the underlying idea here is that the penal system provides a substitute for private revenge, then it turns out that the focus of justification does not centre on the notion of retribution at all. Rather, we seem to be dealing with a utilitarian

approach, where the penal system is justified as a mechanism for the prevention of vendettas, which furthers the goal of social stability - making society better ordered and more secure.

But as C. L. Ten points out, this is clearly not all that Stephen had in mind. (See Ten, 1987: 52) If the satisfaction theory is to count as a retributive theory, then, it has to be given a different interpretation. Stephen gave a hint of an alternative interpretation when he said that the feeling of hatred is aroused in 'healthily constituted minds'. He did not therefore seem to treat the desires in question as brute facts whose presence called for satisfaction, but rather as desires of which he approved. This kind of interpretation is strongly reminiscent of the Humean proposition that moral distinctions, such as the distinction between the deserved and the undeserved, are founded not on reason but on feeling or sentiment. What is in question with retributivism is fundamentally 'retributive emotion'.

The truth of this view of retributivism is that it seeks to justify punishment partly or wholly on the ground that it satisfies the grievances created by offences, through causing distress to offenders, and that it takes penalties to be unsatisfactory if they do less than satisfy grievances or do more than that, and satisfactory if they just satisfy it. Here, the sense of saying that penalty P is deserved for A's offence O is that P will just satisfy the grievance to which A has given rise by O. The requirement of an equivalent penalty, in this sense, is a

direct consequence of the fundamental contention: that punishment is justified partly or wholly by grievance-satisfaction. To do less than satisfy it would simply conflict with the fundamental contention. To do more would be to cause distress which would fail to have the given justification.

The fact that it is reasonably imaginable from our 'healthily constituted minds' not to disregard the existence of such desires and their possible satisfaction gives this view some force in the retributive justification of punishment. But how do we then judge them justly? If we interpret the satisfaction theory in this manner of retributive emotion or sentiment, namely, the basis for satisfying the desire to punish the offender resting on the feeling that the offender deserves to be punished, the question returns to the basic notion of desert. So the satisfaction theory cannot be used sufficiently to explain the basis of the claim that the offender deserves punishment because it itself presupposes that claim. (See Ten, 1987: 52)

III. Ideal Sympathetic Spectator Theory.

A similar line of thought to the retributive emotion theory, but a more improved one can be found in Adam Smith's view about the justice of retributive punishment. In *The Theory of Moral Sentiments* Smith, like David Hume, made sympathy basic to his ethical theory. But the concept of sympathy which he used is different from Hume's, indeed

more subtle and having a greater explanatory power. The right resentment for injuries suffered, for example, Smith held to be:

the indignation they would call forth in [the breast] of the impartial spectator; which allows no word, no gesture, to escape it beyond what this more equitable sentiment would dictate; which never, even in thought, attempts any greater vengeance, nor desires to inflict any greater punishment, than what every indifferent person would rejoice to see executed. (Smith, *The Theory of Moral Sentiments*, 1st ed. 1759, 6th ed. 1790, in Selby-Bigge, 1897: 279)

Smith began with the 'sense of propriety' (i.e., the judgement that something is right). (For this account and below, see Raphael, 1980: 163-4) Hume held that moral approval and disapproval result from sympathy with people who are affected by the action judged. A benevolent action normally has the consequence of giving happiness. We sympathize with the beneficiary and so approve of the action. Smith instead looked in the first instance to sympathy with the feelings of the agent. As a spectator I imagine myself in the agent's shoes. If I find that I should be moved to act as he does in that situation, then my observation of the correspondence between his feelings ('sentiment') and my own hypothetical feelings is an observation of 'sympathy'. This observation of correspondence of sentiments causes me to approve of the agent's motive, to think of it as 'appropriate' or 'proper'.

But then, when I also note the feelings of the person affected by the action, there can be a second sympathy. Suppose that B (the beneficiary) is in need and that A (the agent) is moved to help him. As a spectator I sympathize

with A's motive of benevolence and I approve of it as proper. B feels grateful to A. I can imagine myself in B's shoes, too, and I find that I likewise would feel grateful; so I approve of B's feelings as appropriate. The conjunction of the above two sympathies gives rise to the 'sense of merit'. An impartial spectator will sympathize with B's gratitude, and so think it proper, only if he also thinks A's action is proper. When he does have this double sympathy, he judges A's action to be meritorious, i.e. to deserve the gratitude of B and the kind of action that gratitude motivates, doing good in return.

Contrariwise, if A harms B, B is liable to feel resentment. An impartial spectator will sympathize with B's resentment only if he also thinks that A's action was improper, i.e. if he feels an antipathy instead of a sympathy for A's motive. If he sympathizes with A because he thinks that A's harmful action was justified, he will not sympathize with B's resentment. But if he does think that B's resentment is proper and A's action improper, he will judge A's action to have demerit, i.e. to deserve resentment and the kind of action that resentment motivates, a retaliation of harm.

According to Raphael's interpretation of Smith's theory, retaliation is a law of nature, both the returning of good for good, and the returning of harm for harm. Where resentment and the retaliation of harm for harm would be approved by an impartial spectator, there punishment is in order. (Ibid. 164) This theory seems to be a most plausible one to give an explanation for the retributive

justification of punishment and the notion of just deserts. However, I think that there appears to be a difficulty in this theory; the qualifications of ideal spectatorhood are such that no human-being can be shown ever to possess them. It follows that nobody can assuredly establish that he has reached the conclusions an ideal spectator would reach. Thus this theory alone can not be considered to have a sufficient explanation without its being complemented by some form of rational justification. (For the critique of this kind of hypothetical choice theories, see Donagan, 1977: 220-1)

IV. Consensual Theory.

I shall examine another theory of retributive punishment, though it substitutes consent for moral desert as a fundamental justifying criterion, which gives much insight to a rational justification of punishment. C. S. Nino has recently advanced what he describes as a 'consensual theory of punishment'. (Nino, 1983: 289-306) Nino's theory is an attempt to produce a genuinely liberal position on punishment that on the one hand does not require assessments of moral desert (the worth of one's moral character reflected in one's acts), and on the other hand does not entail unfairly sacrificing individuals for the common good. The classical problem for liberals has been that while assessing moral desert looks to be illiberal, jettisoning considerations of moral desert leads inexorably to unfair sacrifice of individuals, also illiberal.

Nino's solution to this liberal dilemma is to substitute consent for moral desert as the justification for imposing punishment on specific individuals. Punishment then can be justified as an institution for social protection, and one that does not impose unjustifiable burdens on individuals who commit crimes, not because they deserve their burdens, but because they have consented to them. Consent is a trump card in liberal theory, with the power to convert an otherwise unfair distribution of burdens into a justified one. And one who commits a crime consents to punishment because he has acted voluntarily with knowledge of his act's legal consequences, that is, the punishment prescribed for that act.

Nino's argument surely appears sound. Within liberal theory, consent does alter the moral justifiability of burdens imposed on individuals. And the voluntary commission of an act which one has no moral or legal right to commit, with clear notice of the legal consequences attached to that act, surely can be deemed to be consent to those consequences. However, we can raise a problem with the consensual theory of punishment, a problem that Nino completely ignores. As Larry Alexander points out, the problem is that consent not only substitutes for desert as a justification for punishment, but it also overrides desert as a limitation on the severity of punishment. (See Larry Alexander, 1986: 179) Put differently, the consensual theory of punishment justifies any punishment, even if the punishment is severely disproportionate (in terms of the actor's deserts) to the severity of the crime. There is no

proportionality limit to consensual punishment. The point is simple enough. If the law imposes capital punishment for an illegal parking, then one who voluntarily overparks 'consents' to be executed. Execution is therefore not unfair. And deserts by hypothesis do not matter. The liberal who embraces the consensual theory of punishment has no 'liberal' argument against severe punishments for minor crimes.

Nino would reply that the severity of punishment may impose costs that exceed its benefits. Indeed, Nino does argue that punitive measures are only justifiable if they involve "lesser harms than the harm[s] feared" and are "necessary and effective means of protecting the community against [those] greater harms..." (Nino, 1983: 299)

The notion of lesser and greater harms, as Larry Alexander points out, is ambiguous, however. Understood aggregatively, it could authorize imposition of very severe punishments for trivial crimes if the total harm averted is less than the total harm imposed by the punishments. (Alexander, 1986: 179) Nino can be read as treating harm aggregatively, because he relies on the notion of lesser and greater harms to defend a utilitarian idea of social protection against the charge that it justifies extremely harsh punishment.

Nino rejects this interpretation by claiming that: "The argument that social protection would allow extremely harsh penalties for preventing even the most trifling offences is clearly absurd: hanging a motorist for the sake of preventing parking offences would be self-defeating as a

measure of social protection on the assumption that one accepts the scale of values which is crucial to the argument (the death of a person is worse than a congested traffic flow)." (Nino, 1983: 290-1) He does not explicitly explain the assumption on the scale of values, but defends the consensual theory of punishment by setting forth rather dogmatically some of the presuppositions of his thesis: "legal punishment is a state action, and the state and all its acts are justified only insofar as they seek to secure the rights of people to the greatest degree possible; when there is a conflict of rights (as would occur in a case in which state action and state inaction would both lead to violation of rights) one way out is to minimize social harms by giving preference to the more important rights of the greater number of people. But this policy must respect the side constraint of not using some people as means to benefit others, and this situation is avoided when the people who are affected consent to the normative relations which impose the harm." (Nino, 1986: 183-4)

Here the question is why do people do give consent to the normative relations which impose harms? According to Nino, his thesis implies that the goal of punishment is the minimization of social harms, and that consent is only a limitation on the pursuit of that goal. (Ibid. 184) Then what is required for a justification of punishment is the clarification of this additional element of consent. Here, what is required to do is constructing a consensual retributivism. It has to do essentially with what is called

'fairness owed to consent'. Punishment must be fair in that it is among other things a product of the will of the person who suffers it, something which respects his own autonomy.

Here, we may, following Honderich's account, clarify the implications of consent by way of propositions about ordinary contracts in law. (See Honderich, 1984: 220) (i) Consent here can be shown or given by any voluntary act done with the knowledge that the act has as a consequence a certain duty or responsibility. I consent to pay the cab-driver merely by getting into his cab and giving an address. I do not need to say that I agree to pay. (ii) Giving my consent, in so far as the law of contract is concerned, is not dependent on my attitudes then to what it is that I consent to do, or certain of my beliefs about it. I have consented even if I dislike the prospect of paying up, or am against it all things considered, or intend not to pay up, or believe that any obligation to do so can be avoided or will not be enforced. (iii) However, in all cases of contractual consent, there is the requirement that the relevant laws be in some sense just as C. S. Nino also maintains it: "the justification of particular distributions based on the free choice of the parties presupposes the fairness of the legal framework within which those choices are made." (Nino, 1983: 302) (iv) If I do give my consent, thereby entering into a contract, this gives others at least a prima facie moral justification for enforcing it. (v) Finally, if doing what I have consented to do will issue in an unfair or inequitable or

inegalitarian distribution of burdens, it does not follow that I have not consented. It does not matter if the cab-driver is a secret millionaire, etc. Nor does it follow, therefore, that there cannot be the mentioned moral justification for enforcing the contract, despite the resulting distribution. This is the fairness owed to consent.

To sum up the consensual theory of punishment, the individual who performs a voluntary act - an offence, while knowing that the loss of his legal immunity from punishment is a necessary consequence of that act, consents to that normative consequence in the same way that a contracting party consents to the normative consequences following from the contract. (Nino, 1983: 298)

There can be raised some doubts and criticisms to the consensual theory of punishment. (See Honderich, 1984: 223-4) First, there is a certain amount of tension between parts of it. One of its propositions is that an offence is a certain consent to a punishment only if the law in question is somehow just, or if the burden of keeping to the law is a justified one. Another of its propositions is that consent once given can justify a distribution of punishment which may be unfair or whatever. These two propositions do not come together in a supposedly consistent account of consensual retributivism. Secondly, This theory does indeed depend on the first proposition - the law's being just, its burdens being justified. Since this requirement is not clarified, and since it is not shown that it is met, the theory is at least incomplete.

Here the question raised is that before giving consent to the presupposed just law or fair system of criminal punishment, what would be a precise criterion of 'just' law or a 'fair' criterion of the system of criminal punishment. This theory seems to remain silent about the answered to our fundamental question.

V. Contractarian Theory.

A related line of thought about justifying retributive punishment is argued by employing an extension of the contractarian approach whose fruitfulness John Rawls has demonstrated in the area of distributive justice. Although Rawls makes only a few brief remarks about punishment in his book, *A Theory of Justice* (See 1971: 241, 314-15, and 575-76), his approach to a theory of a hypothetical contract is employed to defend a contractarian theory of retributivism.

I think we can find a typical contractarian approach to the retributive punishment in David A. Hoekema's argument which develops a strategy substantially similar to Rawls'. (See Hoekema, 1980: 239-69) Before taking up the argument of punishment, let us see a general outline of Rawls' hypothetical contract theory.

Rawls suggests that one way of assessing the justice of social institutions is to ask whether persons would choose to establish such institutions from a hypothetical position of equality and freedom. In what Rawls calls the 'original position', everyone is imagined to be ignorant of his or

her identity and social position. The intent of this and other ignorance conditions is to prevent anyone from making choices based on personal advantage. In the original position each party must choose a set of principles which will govern the basic structure of society. (See Rawls, 1971: 3-21) By approaching questions of justice in this way, Rawls in effect divides such questions into two stages: First, what would be a fair situation from which to choose principles to govern basic institutions? Second, what kind of principles would be chosen from such a situation? In the original position as he describes it, Rawls argues that the parties would choose two basic principles, a principle of equal liberty and a principle requiring that inequalities benefit every one, even the worst off. (See Ibid. 60-5 and 302-3)

Ronald Dworkin distinguishes 'goals', 'rights', and 'duties', as the fundamental justifying devices in a political theory and suggests that any political theory must take one of these as the fundamental moral category. Rawls' theory, according to Dworkin, rests on a 'deep[er] theory' in which rights are central. Again Dworkin posits as the foundation of Rawls' theory of justice a right of all to equal concern and respect in the design and operation of the institutions to which they are subject. (See Dworkin, 1973: 500-33, reprinted in Daniels, 1975: 16-53, especially 38-42 and 46)

The question now to be examined for this approach is which theory, if any, among alternative accounts of punishment, namely, retributive, deterrent, or

rehabilitative theory, provides adequate support for a system of punishment and which poses the least serious threat to individual rights.

Hoekema approaches this question by putting it before parties in a hypothetical choice situation who must choose a set of principles to govern institutions of punishment in ignorance of the particular facts about themselves and their position in society. The motivation for employing this approach is that disagreement over features of social institutions which arises not from consideration of justice and fairness but from considerations of personal advantage may be ruled out by imagining that the relevant principles must be chosen under suitable ignorance conditions. (Hoekema, 1980: 248-49)

However, an initial assumption in a hypothetical choice situation is that questions of punishment belong to 'partial compliance theory'. (Rawls, 1971: 8) What does this mean? One of the facts about human nature and social interaction which the parties to the hypothetical choice know is that the assumption of full compliance with the laws and policies of society is unquestionably false. Under any imaginable social order, people will disobey laws and policies from time to time for a variety of reasons, particularly when it appears to them that personal advantage may be served by doing so. Thus, the parties in this choice situation do not assume full compliance, and they know that if there are laws they will be broken.

But to say that laws will be broken is not to say that a system of punishment is necessary. Punishment is the

deliberate deprivation of rights or infliction of hard treatment on individuals by duly constituted authorities, and one option open to the parties in the choice situation is to omit any such institution from the design of their society. They might substitute a system of persuasion and exhortation, or they might choose to create an institution of legal punishment; and if they do, they will need to choose how it will be organized and administered.

Then, the choice has to do with a kind of distribution; in other words, it is a choice of the way in which a society will distribute a particular set of benefits and burdens among its members. Here the question is precisely as to what kind of distributive rule would be adopted. The parties in the choice situation may take the deontological principle of desert as their fundamental distributive rule. Or, on the contrary, the parties in the choice situation may want to maximize the benefits and minimize the harms to which they will be subjected. However, as to this question, Hoekema views that the parties will take the latter position. (Hoekema, 1980: 250) In order to account for the motivation of the parties Hoekema employs a version of Rawls' 'thin theory of the good', the theory of what it would be rational to want whatever else one wants. (Rawls, 1971: 395-99) This theory seems to assume another truism about the nature of rational human beings. In order to explicate this theory, let us see Rawls's account briefly. Rawls provides a list of several categories of primary goods - income and wealth, powers and opportunities, rights and liberties, and 'the bases of self-respect' - which he

regards as means for the attainment of anyone's particular ends. (Ibid. 90-95 and 440)

Hoekema follows Rawls in supposing that each party in the choice situation is interested in securing for himself or herself the greatest quantity he can obtain of primary goods - i.e., in this case, the greatest measure of personal freedom. Now the first choice to be made is the choice of whether to include an institution of punishment in society. According to Hoekema, the parties would choose to include a system of punishment because the harm they are likely to suffer if no such institution exists poses an unacceptable cost. They know that a system of laws and punishment designed to protect the freedom of each person and to preserve the rights of all will have the effect of diminishing harmful conflict and infringement of rights. (Hoekema, 1971: 252-3)

However here the question concerns what particular reason among the rival justifications the parties would ground their choice of an institution of punishment? As may be seen in a logical corollary of the above argument, the parties would choose to include an institution of punishment in order to reduce the incidence of crime and bring about general compliance with the law, thus securing protection of individual rights. In contrast with the retributive reasons, then, considerations of deterrence would provide strong support for the existence of an institution of punishment. According to the reasoning heretofore, the above contractarian theory can be interpreted to support an utilitarian justification.

But Hoekema contends against the simple-minded deterrence justification of an institution of punishment. He argues in favor of a liberal version of deterrence justification. (1980: 255-6) For this argument, a crucial consideration is that there are far more effective ways of achieving deterrence besides punishment, as contemporary police states have demonstrated. The methods of indoctrination, intimidation, and surveillance employed by such states to prevent commission of crimes by citizens are enormously varied, and vast new opportunities for such supervision and control are opened by electronic technology.

Imagine that a well-organized and humane police state created such effective means of intimidation and surveillance that scarcely anyone ever committed a crime. Anyone who is suspected of engaging in illegal activities is immediately warned to stop by the voice of a police officer issuing from the receiver portion of his collar. An electric shock device might be an optional accessory for emergency use.

The point is that under such a system hardly anyone would ever succeed in committing a crime. ^The deterrent purpose of punishment is therefore undercut. Such a humane police state would achieve the goal of deterrence even more effectively than a system of punishment with procedural protections and extensive personal freedom. Deterrent considerations would therefore suggest that we eliminate punishment in favor of such a system.

What is wrong with the kindly totalitarian state, of

course, is that it achieves deterrence only by trampling on everyone's rights, such as the right to privacy and to freedom of the person. The reason why we would choose a system of punishment over a police state without punishment is that we want to reduce the incidence of crime only by means which respect the rights of individuals. Thus Hoekema argues that the justifying reason of an institution of punishment is not just deterrence but deterrence subject to the constraints of right that we are seeking. The point that Hoekema makes here is that these constraints are not retributive, properly speaking, since they do not establish any acceptable retributive reasons for creating an institution of punishment. But the constraints show that the choice of an institution of punishment is motivated not merely by the result achieved but by the manner of achieving it. Consequential considerations alone are not sufficient to support this choice; the character of the means employed in bringing about compliance with the law must also be considered. (Hoekema, 1980: 256)

Once having chosen to include an institution of punishment in the basic structure of society, the parties must next select a set of principles which will govern its application. By what standards shall persons be selected to be punished and particular sanctions imposed on them? A contractarian might argue for the answer that considerations of rights and liberty - the interest which the parties have in preserving their integrity as choosing and self-determining agents - will lead them to adopt a

fundamentally retributive set of principles as the basis for the application of punishment. But what would be a precise reason for that argument?

In making their choice they will consider the cost of ending up in any of the resulting positions and the risk of being in that position. Rawls argues that the parties to the original position as he conceives it would choose a maximin rule and select the set of principles which assures the best worst position. (See Rawls, 1971: 150-61) But Hoekema contends that the conditions for adopting a maximin rule do not appear to be present in the case of institutions of punishment even if Rawls is correct that a maximin choice is rational in the conditions he stipulates. Yet the worst position under a system of punishment is important, and even if a maximin strategy would not be adopted Hoekema believes that the worst position would function as a criterion in a different way. The system with the best worst position would not necessarily be chosen, but a system with an intolerable worst position would be excluded from consideration. The parties will not be willing to choose a system of punishment with a worst position which they cannot accept the risk of occupying. In particular, since the parties think of themselves as agents with a right to self-determination, they will not be willing to accept a system some of whose positions effectively undermine this fundamental right. A kind of 'worst-position veto' will thus be involved in their choice. (Hoekema, 1980: 259)

According to a kind of worst-position veto, both the

deterrent and the rehabilitative systems of punishment have intolerable worst positions. Then the only acceptable choice is a retributive system of punishment. The worst position under a system of utilitarian punishment is the position of an innocent person punished for the sake of general deterrence. There are other positions under a utilitarian system which are similarly objectionable. Considerations of deterrence would allow and even require exemplary punishment of the guilty - punishment which is unusually harsh for reasons of deterrence. The objections to the rehabilitative principle as the basis of punishment, or as a substitute for punishment, are equally conclusive. This principle divorces the treatment of individuals radically from their choices, since liability to punishment or treatment is not dependent on one's past acts. It therefore systematically disregards the individual's right to self-determination, a right which the choosing parties are concerned to protect. Under a rehabilitative system I can not control my future condition by my acts or even predict my future condition. Whether I will be subject to imprisonment and rehabilitation depends on whether those in authority judge that I need such treatment. The remaining choice for the parties in the choice situation is that of a fundamentally retributive system of punishment. On retributive principles, persons are selected for punishment according to their past deliberate acts of violation of law, and the severity of punishment is set by proportionality to the seriousness of the offense committed. (See Hoekema, 1980: 259-63)

Now let us examine the plausibility and soundness of this kind of contractarian justification of punishment. First, Hoekema's contractarian argument which employs the Rawlsian theory of justice has its roots in the Kantian moral theory and thus regards the autonomy and equal liberty of persons as fundamental premises. (See Rawls, 1971: 251-7, section 40, "The Kantian Interpretation of Justice as Fairness"; see also Rawls, 1980: 515) It is therefore legitimately to be expected that Hoekema's argument in his contractarian (Rawlsian) justification for the institution of punishment should be based on some kind of deontological postulates of a Kantian type. But this is not the actual sense of his argument, since for Hoekema as well as for Rawls the reason for choosing the institution of punishment is presented in terms of a consequentialist notion of deterrence, namely, by considering the cost and effect of introducing a system of punishment. (See also Rawls, 1971: 241, "the principle of responsibility is not founded on the idea that punishment is primarily retributive or denunciatory.") By contrast, Kant as a traditional retributivist would call on retributive considerations at this point, insisting that we must include the institution of punishment in society because we have an obligation to impose on criminals the penalties they deserve, whatever the effects of the practices may be. This raises questions: on what grounds ought the Rawlsian contractarian to depart from the Kant's categorical imperative by adopting an utilitarian notion of deterrence while insisting on the retributivist justification of distribution of punishment? Of course,

there will be no absolute necessity for a contractarian theorist to use the retributive justification both in relation to the institution of punishment and in relation to the distribution of punishment, but it will be reasonable to ask that at least the Rawlsian contractarian who confesses to be a Kantian should use a retributivist theory so as to remain consonant with the Kantian account of punishment. However, Hoekema does not do this and fails to give consistent and sufficient explanations for not doing so. Probably one can find an answer to the question why Rawlsian theory of justice goes so far to accommodate the utilitarian notion of consequences of punishment and thus becomes incoherent with Kantian moral theory by scrutinizing the main features of Rawls's theory of justice. But I shall discuss this issue in an other place. (See Chapter 5, I.(i) Rule-Utilitarianism)

Secondly, one practical issue in Hoekema's contractarian theory is that of determining just what type and measure of punishment is in (moral) fact proportionate to the offence committed by the offender. The difficulty of principle underlying this problem is that the two elements are actually incommensurable; there are no acceptable common units of measurement in terms of which we can assess the relationship of equivalence. Since the theory of social contract, as D. D. Raphael points out, was originally intended to deal with the problem of political obligation (why should a man obey the state?), rather than to uphold an explanation of justice, this version of contractarian theory too gives no substantive guidance to the measure of

just deserts and leaves this matter to be explained further. (See Raphael, 1980: 157; see also Sher, 1987: 89 n.)

VI. Reciprocity Theory or Fair Play Theory.

VI.1. Removing Unfair Advantage and Restoration of the Social Equilibrium.

Given what has been said of the deficiencies in preceding accounts of retributive justification of punishment, it makes sense to attempt further to explicate the desert principle within the context of some wider, compatible, background political philosophy. Here the attempts I will consider explore the links between the notion of desert and those of justice, fairness and equality. The concepts of fairness and equality have been central to the desert tradition, and it is thus with these that I shall begin.

The perplexing question which traditional retributivists leave inadequately explained is why a morally autonomous being of intrinsic worth who voluntarily causes the undue suffering of another deserves a return of proportionate suffering or even any suffering at all. By what 'mysterious piece of moral alchemy' is it that we add suffering to suffering and get a moral good? (See Hart, 1968: 234) To answer this question, some contemporary retributivists employ a so-called 'reciprocity theory', (See Falls, 1987: 26) or 'Fair Play Theory'. (See Cottingham, 1979: 242-3) Their interpretation of retribution as reciprocity or fair play essentially maintains that a return of proportionate

suffering is justified as a way of establishing equal liberty and autonomy and thus the fair sharing of the burdens and benefits of law.

The reciprocity theory starts with the uncontroversial observation that the very existence of a certain social norm or rule of game (which may be called law) constitutes both a benefit and a burden for us all. Its prohibitions against certain kinds of interference in our lives benefit each, but only as long as each in turn accepts the burden of refraining from interfering in the proscribed way when the desire strikes. To this empirical description, the theory adds the moral claim that fairness, not utility, demands 'reciprocity': that those who have benefited from the submission of others to the law should shoulder a 'comparable burden' in return, or that there must be an 'equilibrium of burdens and benefits'. Criminals upset the balance and gain an 'unfair advantage' or 'profit'. (Falls, 1987: 27; The words 'reciprocity' and 'comparable burden' are used by Jeffrie Murphy. 'Equilibrium of burdens and benefits' is used by Herbert Morris. Morris uses 'unfair advantage'; Murphy prefers 'unfair profit'. see Morris, 1968: 475 or 1976:31-88; Murphy, "Kant's Theory of Criminal Punishment" and "Marxism and Retribution", 1978: 82-92 and 93-115; see also similar accounts, with some variations, advocated by John Finnis, George Sher, and Wojciech Sadurski. Finnis, 1980: 263-4; Sher, 1987: Chap.5; Sadurski, 1985: Chap.8)

This theory, so-called 'restorative retributivism', which is run together with consensual, contractarian and like

ideas, but clearly can be separated from them by involving a certain equality, fairness, justice, rationality, equilibrium, balance, reciprocity, debt-payment, or order, is considered thereby to be improved. (See Honderich, 1984: 227)

To try to become clearer about this, we are invited to consider the nature or function of the criminal law. The reciprocity theory justifies the institution of punishment in terms of the ideal of 'balance of benefits and burdens'. (See Morris, 1968; see also Sadurski, 1985: 47-59) Criminal law is concerned with maintaining the equal distribution of a specific set of benefits among the members of the community: in particular, the benefits of autonomy of action within a sphere which should be beyond interference by others. The enjoyment of these benefits by a person is correlated with another person's duty not to interfere with the exercise of recognized rights to autonomy. This is a prerequisite for the effective use of an autonomy-right; it may be enjoyed only if others restrict their activities. Those restraints that are prerequisites for the effective use of benefits of autonomy can be represented as burdens upon a person's life since they cut off a number of options which would otherwise be available to this person.

From this fundamental premise of equal enjoyment of autonomy-right, harm inflicted on a victim by an offender is regarded as constituting the limitation of the victim's use of his rights. By infringing those rights, the offender intrudes upon the enjoyment of his victim's autonomy and

thereby oversteps the bounds of his own sphere of autonomy in such a way as to limit his victim's autonomy. As a result, the equal distribution of benefits secured by the criminal law has undergone a change: the legally recognized frontiers between any two person's spheres of autonomy are moved to the victim's detriment. The status quo ante with respect to the initial balance of benefits and burdens is upset since the offender has arrogated to himself part of his victim's sphere of autonomy and he has renounced some of his own burdens: namely, the burdens of self-restraint.

Then, it is to be argued that this disrupted initial balance can only be restored by a relocation of burdens. If an offender has renounced some of his fair package of burdens, the balance will be restored when he suffers more burdens than would be normally required to safeguard the enjoyment of rights by other people. Just as with the allocation of benefits under distributive justice, where additional rewards correspond to desert, so in the case of punishments the burdens inflicted by a society correspond to the degree of illegitimate benefits gained by the offender. It is a redistribution after the wrongful distribution of benefits of autonomy and correlated burdens of self-restraint has taken place. (See Sadurski, 1989: 357)

VI.2. Criticisms.

In the light of the above understandings of the reciprocity theory, let us examine the merits and demerits of the theory. I shall consider some objections to the reciprocity theory as a vehicle for clarifying the

connection between fairness and retributive desert. Most of the criticisms of reciprocity theory have been aimed at showing that neither law-abiding behaviour, nor criminal action, fits the description in terms of 'benefits' and 'burdens', i.e. that law-abiding conduct is not necessarily burdensome, nor is criminal invasion of other people's rights necessarily beneficial to the offender.

(i) In an interesting essay, "Do the Guilty Deserve Punishment?", Richard W. Burgh discusses the retributive theory and has serious reservations about its ability to capture our intuitions either about who deserves punishment or about how much punishment various wrongdoers deserve. (See his essay 1982: 193-213)

Burgh's first objection concerns the premise that the wrongdoer gains an unfair advantage by benefiting twice. It may seem obvious initially that any wrongdoer does benefit once from the self-restraint of others and a second time from his own lack of self-restraint. (For this point, see Sher, 1987: 78)

However, as Burgh notes, this premise seems to fail whenever the wrongdoer lacks the capacity to be interfered with as he has interfered with his victim. It fails, for example, in cases of rape, since (for all practical purposes) women cannot rape men. It also fails in cases of embezzlement, since the sphere of noninterference which laws against embezzlement define protects only those who have assets that can be embezzled. (See Burgh, 1982: 205) Yet clearly the fact that an embezzler happens not to be in a position to be embezzled from should be irrelevant to the

question of whether he deserves punishment. But if we understood Burgh's assertion as we follow his argument, then the rapist and embezzler have not benefited from the restraint of others as well as from their own wrongdoing because they cannot be interfered with as they have interfered with their victims. Hence, we seem unable to construe their punishment as cancelling their unfair additional advantage.

This argument however, as George Sher contends, proceeds too quickly. Even if the rapist cannot be raped or the embezzler embezzled from, they may have benefited from their victim's and other persons' restraint in not harming them in closely related ways. In particular, the rapist may have benefited by not being physically assaulted, and the embezzler by not being defrauded. (See Sher, 1987: 79) In Burgh's own words, they have still obtained "a second-order set of benefits, namely, those received from obedience to law in general". (Burgh, 1982: 206)

If Burgh acknowledges that the rapist and embezzler have benefited from others generally restraining themselves from wrongdoing, why does he still deny that these individuals deserve punishment according to the benefits-and-burdens account? Burgh's second argument is that appeals to generalized benefits are regarded as illegitimate. To make such an appeal, he argues, is to imply that all wrongdoers have received the same benefits, and, hence, "that all offenders are, regardless of the offense they committed, deserving of the same punishment." (Ibid.) In view of this, Burgh maintains that any appeal to generalized benefits

would fail to capture the intuition that different transgressions call for different penalties.

This argument is mistaken. As we can see in Sher's rebuttal, the benefits-and-burdens account regards punishment as justified not merely by the wrongdoer's receiving the benefits of other's self-restraint, but by his having these benefits plus the benefit of his own lack of self-restraint. Moreover, even if wrongdoers do all receive the same amount of benefit from the self-restraint of others, they can be expected to get differing amounts of excess benefit from their own transgressions. Since it is the latter excess that punishment seeks to remove, the amount of punishment needed to remove it can be expected to vary as well. (See Sher, 1987: 80)

This response seems to dispose of the worry that not all wrongdoers receive a double benefit. However, in doing so, it raises a further question. How does the benefits-and-burdens account equate amounts of punishment deserved with amounts of excess benefit received?: how are these excess benefits to be measured? According to Morris's account of the reciprocity theory which stresses on a benefit and burden of self-restraint by the law-abiding citizens, It is tempting to say that the wrongdoer's excess benefit is just the amount of extra freedom he has secured by transgressing. But this merely defers the difficulty, for we now need to know what determines the extra freedom gained.

Here Burgh's third argument is that the most natural measure of a wrongdoer's extra freedom is the strength of

the inclination he has refrained from inhibiting. His argument goes as follows: "The stronger the inclination, the greater the burden one undertakes in obeying the law. Hence, if the strength of the inclination to commit one crime is stronger than another, a greater advantage will be derived from committing that crime." (Burgh, 1982: 209)

But this produces a serious problem. If the benefits of wrongdoing are measured by the inclinations that wrongdoers fail to inhibit, then the amounts of punishment that wrongdoers deserve will also be measured in this way. Thus, since "most have a greater inclination to cheat [on income taxes] than they ever have to murder," (Ibid.) the punishment that tax evaders deserve must be greater than the punishment that is deserved for murder. However, intuitively, the murderer surely deserves the harsher penalty. We must accept that the strength of one's inclination to transgress cannot be what determines the amount of extra benefit one receives from transgressing.

But even though we endorse our intuition that the murderer and the tax evader deserve different amounts of punishment, we still need an answer as to what would be a plausible criterion of degree of benefit vis-a-vis burden. Intuitively, our belief that these persons deserve different amounts of punishment has little to do with any empirically discoverable differences between them. Instead, as Sher argues, the crucial difference appears to be moral. (Sher, 1987: 81) If we believe that the murderer deserves a harsher punishment, it is surely because we regard murder as by far the more seriously wrong act. But

if so, then the most natural candidate for what determines the murderer's degree of extra benefit is precisely the strength of the moral prohibition he has violated. By this criterion, the reason he has benefited more is not that he has indulged a stronger inclination, nor yet that he has received greater financial or psychic rewards. It is, instead, that he has violated a moral prohibition of far greater seriousness. (See *ibid.*)

It is plausible, thus, that by equating a wrongdoer's degree of benefit with his act's degree of wrongness (or, his moral culpability), we can resolve the problem of proportionality. Here the central requirement of the matter is that the proportion must be between the seriousness (or gravity) of the offense on the one side, which includes not just the harm caused but also the culpability of the offender, and on the other side the severity of the punishment. (See Galligan, 1981: 164) Based on this interpretation of the problem of proportionality, I shall discuss the issue of measuring the just deserts in detail in a later stage. (See Chapter 5, IV.)

(ii) In her interesting essay on 'the moral accountability theory', M. Margaret Falls criticizes the reciprocity theory of punishment by pointing out its incompatibility with a moral tradition which postulates that "willing the moral good is the highest human good and therefore in doing evil one harms oneself rather than profits." (See Falls, 1987: 30-1) This tradition, which Falls endorses, and which she derives from Kantian moral teaching, must undermine the view that it is punishment's

aim to re-establish the equilibrium of benefits and burdens, since if "doing evil harms the evildoer" then the "burden of obedience [to law], if accepted, is actually a benefit", hence "there is no profit for punishment to remove." (Ibid. 31)

M. M. Falls's criticism seems plausible since we can agree with a view that human living, disciplining oneself for the sake of education and enlightenment is a burden well worth taking on, and people who accept that burden are 'better off' than those who cast it. But, upon scrutiny, her criticism is mistaken. The meaning of words 'advantage', 'gain', 'benefit', or 'profit' used in the reciprocity theory is not necessarily a value-oriented one with some ethical connotations, but rather a value-neutral one which can be usefully employed for describing a relationship between a wrongdoer and a law-abiding citizen in our ordinary social life. (See Joel Feinberg's usage of 'profit': "When a remorselessly wicked person appears to be flourishing, and there appear to be no reasons to suppose he is not, then I 'assume' that he is indeed profiting from his wickedness, and try to fashion my theory of harm and benefit to save the appearances.", in 1984: 67) By contrast, M. M. Falls's usage of the words is a value-oriented one since she tries to equate 'benefit' or 'advantage' to the 'moral good'. Her insistence on the usage of words 'benefit' only in the context of furthering of the moral good can be understandable from a stance such as that we prescribe our moral life. But the usage of words we employ in the reciprocity theory is not so much a

prescriptive one as a descriptive one defining our social behavior.

(iii) But given that the reciprocity theory establishes the case for restoring the social equilibrium of benefits and burdens by removing the unfair benefits of offenders, why is it that these forms of punishment can remove the unfair benefits? As D. J. Galligan points out, this theory "requires at most that the offender be singled out, condemned and subjected to some form of disadvantage; but just what manner and form the disadvantage must take is left open". (Galligan, 1981: 158) Here the reciprocity theory needs some help from external considerations before it can provide a full justification of punishment. (For this point, see Ten, 1987: 59)

The appeal to external considerations is recognized by John Finnis when he argues that the restoration of fairness in distribution via punishment is not the only component of the social good, and so need not be pursued regardless of consequences. (See Finnis, 1971-2: 135) But if consequential considerations of this sort enter into the final decision as to whether punishment should be inflicted, then these considerations form part of the complete theory of punishment. (See Ten, 1987: 59)

John Deigh also points out, in the course of discussing J. E. McTaggart's view concerning the plausibility of the Hegelian reform theory of punishment, (See McTaggart, 1896: 479-502) the deficiency of the reciprocity theory by saying that a punishment benefits its criminal recipients. (See Deigh, 1984: 191-211, especially 202) According to Deigh's

view, punishment renders a benefit to the criminal by providing him with the means necessary for his moral regeneration and expiation, by facilitating reconciliation, a renewal of good relations and by relieving the weight of one's guilt and quieting one's conscience. (Ibid. 203) I think this consideration for the justification of punishment is an illuminating and a convincing element for complementing the simple version of the reciprocity theory and it needs a further exploration. I shall consider this line of thought later when I discuss teleological retributivism.

(iv) There is a more general problem about the application of the reciprocity theory to society in real worlds which deviate in varying degrees from the ideal of a just society. In other words, as Sadurski says, perhaps the most serious argument against the reciprocity theory as described here is that it ignores (or, even worse, rationalizes) socio-economic inequalities and the role of law in maintaining and perpetuating these inequalities. (See Sadurski, 1989: 365-6)

If punishment indeed aims at restoring the balance of benefits and burdens, it is argued, for example, by Jeffrie G. Murphy, that it should take into account not only the redistribution of benefits and burdens resulting from the crime, but also the disequilibrium before the crime. To represent punishment as restoring the social equilibrium of benefits and burdens is to seriously believe that in a real life such a balance exists; in this way, this theory could be seen as a device of ideological distortion or of

justification of social inequalities. (See Murphy, 1973: 233 and 237-42; see also Hugo A. Bedau, 1978: 617)

So if criminals were all the victims of a broader social injustice in the distribution of society's resources, and the victims of crime were all the beneficiaries of the injustice, then the reciprocity theory would have no application. But the situation is in fact more complex. As Sadurski maintains, the above objection to the reciprocity theory is based on the misunderstanding that it identifies the 'benefits' with the material privileges rather than with autonomy of unrestrained action, and 'burdens' with material deprivation, rather than with self-restraint. (Sadurski, 1989: 365-6) Also an empirical observation as C. L. Ten describes tells us that many of the victims of crime come from the same economically and socially deprived groups as those who offend against them and there is also a substantial number of offenders who belong to the favoured groups in society. (See Ten, 1987: 64) Thus we can still argue that even in societies in which the distribution of benefits and burdens is quite unfair, the thesis that crime involves the taking of an unfair advantage from law-abiding citizens still has an explicatory force. Of course the problems of general social justice cannot be solved by punishment alone, leaving the distribution of socio-economic goods to other instruments of social regulation (viz, distributive justice according to deserts and basic needs).

VII. Summary.

So far I have discussed retributive theories for the justification of punishment. My discussion has centered on the notion of just deserts for the justificatory account of retributive punishment. At first, the notion of retributive desert was examined as a non-comparative one in the theory of intrinsic retributivism. Our intuition gives, as we have examined, a *prima facie* probative force to the retributive justification of punishment, though not a conclusive one. Thus we have investigated various sophisticated versions of the comparative conception of retributive desert for a more substantial and conclusive justification of punishment. The consensual theory and the contractarian theory we discussed in this context are not desert-based theories but are theories employed for an essentially retributive justification.

In addition to intrinsic retributivism, The ideal, impartial spectator theory and the reciprocity theory have respectively, though each on a different level, namely, one on the sentimental basis, and the other one on a rational basis, provided a plausible account for the retributive justification of punishment. Particularly, the reciprocity theory gives us a plausible account of the fundamental principles of retributive punishment, that is, the principles of just deserts, responsibility, and proportionality. However, we also discovered some deficiencies in the retributive theories described so far in that they need external considerations for a conclusive and satisfactory explication of what is a justified punishment. We need to examine the expressive and

communicative function of punishment which is an inherent element of every punishing activity, designed to give some symbolic messages to the criminals as moral agents as well as to the victims and the society in general. Further, with this communicative function, punishment is required to serve some teleological ideas, namely, moral regeneration and expiation of the criminal, and facilitating a reconciliation between the criminal and society. I shall consider these points in turn in the chapter on teleological retributivism. (See Chapter 5, II and III) Before doing so, I shall examine utilitarian theories briefly in order to develop an understanding of what similarities and differences obtain between the typical utilitarian justifications and the teleological considerations which are employed in my account of teleological retributivism.

CHAPTER 4. ALTERNATIVE THEORIES

I. Utilitarian Theories and Consequentialist Punishment.

In view of some difficulties with the backward-looking retributive theories, it now seems appropriate to turn to the opposed tradition of consequentialist argument to see whether it can provide a more convincing rationale for institutions and acts of punishment. For if we were really to believe that punishment did nothing other than to restore a social equilibrium: if it had no other good consequences whatsoever, would we really be prepared to support it as a social practice, whatever our accustomed attitudes and discourses of praising and blaming?

The forward-looking utilitarian theory of punishment emphasizes its beneficial consequences, in the sense that both the general justifying aim of punishment and criteria of penalty-fixing are grounded in the value of the predicted consequences of punishment. Utilitarians claim that an appropriate punishment should serve four main purposes: it should deter others who might commit a crime, it should deter the offender from repeating offences, it should reform or rehabilitate the offender himself and it should protect society at large from people who are likely to commit further crimes. Why and how does an appropriate punishment bring forth beneficial consequences? Let us examine utilitarians' main account in more detail. (See Greenawalt, 1983: 351-2)

(i) General deterrence. Knowledge that punishment will

follow crime deters people from committing crimes, thus reducing future violations of rights and the unhappiness and insecurity they would cause. The person who has already committed a crime cannot, of course, be deterred from committing that crime, but his punishment may help to deter others. Utilitarians normally view that general deterrence is very much a matter of affording rational self-interested persons good reasons not to commit crimes. With a properly developed penal code, the benefits to be gained from criminal activity would be outweighed by the harms of punishment, even when those harms were discounted by the probability of avoiding detection. Accordingly, the greater the temptation to commit a particular crime and the smaller the chance of detection, the more severe the penalty should be.

(ii) Individual deterrence. The actual imposition of punishment creates fear in the offender that if he repeats his act, he will be punished again. Adults are more able than small children to draw conclusions from the punishment of others, but having a harm befall oneself is almost always a sharper lesson than seeing the same harm occur to others. To deter an offender from repeating his actions, a penalty should be severe enough to outweigh in his mind the benefits of the crime. For the utilitarian, more severe punishment of repeat offenders is warranted partly because the first penalty has shown itself ineffective from the standpoint of individual deterrence.

(iii) Incapacitation. Imprisonment puts convicted criminals out of general circulation temporarily, and the

death penalty does so permanently. These punishments physically prevent persons of dangerous disposition from acting upon their destructive tendencies.

(iv) Reform. Punishment may help to reform the criminal so that his wish to commit crimes will be lessened, and perhaps so that he can be a happier, more useful person. Conviction and simple imposition of a penalty might themselves be thought to contribute to reform if they help an offender become aware that he has acted wrongly. However, reform is usually conceived as involving more positive steps to alter basic character or improve skills, in order to make offenders less antisocial. Various psychological therapies, and more drastic intervention such as psycho-surgery, are designed to curb destructive tendencies. Educational and training programs can render legitimate employment a more attractive alternative to criminal endeavours. They may indirectly help enhance self-respect, but their primary purpose is to alter the options that the released convict will face.

The above four beneficial consequences are identified by utilitarians as the main justifying aims of punishment. Thus, criminal punishment is justified because, and in so far as, its good effects outweigh the sufferings of the convicted person.

The earliest paragon of this view is Jeremy Bentham who puts the matter in the following fashion:

The general object which all laws have, or ought to have in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to

exclude mischief... But all punishment is mischief: all punishment is in itself evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil. (*An Introduction to the Principles of Morals and Legislation*, edited by J. H. Burns and H. L. A. Hart, 1982: Chap.XIII, 158)

Punishment serves to 'exclude some greater evil' when by the working of deterrence, reform and incapacitation, the misery and insecurity created by crime is reduced. It may be objected that reform and deterrence effects of punishment have been exaggerated. Nevertheless, it is reasonable to suppose that some criminals, when punished, do not repeat an offence and that the threat of punishment stays the hands of some persons tempted to crime. In such cases, if punishment, as compared to other alternatives, e.g., psychiatric treatment, has maximum utility, the utilitarian is obligated by his views to endorse punishment.

We may find the rationale of this argument in the following features of utilitarianism. First, utilitarianism is regarded as the theory of individual prudential rationality as the framework for rational social choice. Just as the individual agent can discount various present satisfactions in favour of future well-being, so it is argued that the utilitarian legislator or the impartial spectator can discount the interests of some individuals in favour of the interests of others. (For this point, see Rawls, 1971: 28) Secondly, utilitarianism is structurally a monistic theory: that is, it claims that there is only one morally relevant property, happiness, and only one basic moral principle to maximize happiness. Thirdly, It is

also a consequentialist theory: it judges the rightness or wrongness of an action purely by its consequences; the right action is the one which has better consequences, in terms of human happiness, than any of the alternatives.

However, there is an immediate criticism of the utilitarianism such as this: punishment which passes utilitarian standards may be undeserved, hence unjust. (See, for example, H. J. McCloskey, 1965: 239-55, in Ezorsky, 1972: 119-34) Indeed, as they see the matter, utilitarians are committed to undeserved punishment of two sorts, legal and illegal.

Consider a legal case first. Laws prescribing excessive punishment, i.e. undeserved in light of the offence, may also satisfy a utilitarian standard (e.g., deterrence). Imagine a community where loitering is so widespread as to be a public nuisance. A law is enacted prescribing one year in prison for loitering. It might very well be the case that only one person would be punished under this law. The threat of such severe punishment, reinforced by infliction on one offender, is sufficient to deter all other potential offenders. The good utilitarian effects of the law may very well outweigh the bad ones. But a one year jail sentence for loitering is certainly undeserved, hence unjust. (See Ezorsky, 1972b: xv)

Utilitarians, it may be argued, are also committed to undeserved punishment which is illegal. Let us suppose that there has been a wave of vicious crimes, and the police are unable to find the culprit. Since no one is punished for these offenses, the deterrent threat of punishment becomes

increasingly ineffective, and more persons are tempted into committing the crime. To frame and punish an innocent person for these offences may reinforce the deterrent threat of punishment. A few such scapegoat punishments might avert great harm and be worth while for their utility. This point is precisely the target against which the strongest criticism of utilitarianism has been raised. The criticism is that it is wrong that punishment should be motivated by a social utility alone: whatever is done to individuals should be primarily concerned with them as ends in themselves: should treat them as autonomous moral agents who have chosen their actions. Another reason for the criticism is that victimizing an innocent is treating him in a way that he does not deserve.

Perhaps the feature of utilitarianism which generates the most antagonism among its opponents is its consequentialism. The guiding principle of consequentialism appears to be the dictum that the end justifies the means. Any action, including disloyalty, lying, cheating and even murder is permissible, indeed obligatory, if it needs to be done to achieve some good result and if the good achieved in the end outweighs the harm done on the way. What matters is not how the good result is brought about, or who brings it about, but simply that it is brought about.

Here, consequentialism is only concerned with securing the best outcome overall in a given situation, and this may mean doing something quite horrible. If the only way to prevent ten murders is to commit one yourself, then utilitarianism would appear to require that you do just

that. Or suppose that your country is waging a just war, and that an enemy agent you have captured tells you that he has planted a bomb in an area crowded with civilians and that, unless defused, it will soon go off, killing many people. Suppose that there is not enough time to conduct a general search for the bomb, and that all of your attempts to get the agent to reveal its location are unsuccessful. Suppose, however, that you have captured him with his family, and that by torturing his small child in front of him you could eventually destroy his resolve and get him to give you the information. Utilitarianism seems to imply not only that you may but you must torture the child. These implications and others like them strike many people as entirely unacceptable.

In these days, one strong standard criticism of utilitarian theory is that it cannot provide an adequate account of individual rights, and therefore fails to accord due respect to persons. Particularly, contemporary right-based theorists argue that individual agents are unique autonomous sources of value which cannot be discounted against one another. Underlying this argument is an intuitive belief in the moral priority of persons and their rights over any conception of social welfare or well-being. Consequently, they argue that utilitarianism cannot make sense of distributive justice because it is concerned with maximizing overall benefits irrespective of how they are distributed.

What then does this contemporary criticism of utilitarianism, that it ignores the moral importance of the

separateness of individuals, mean? The first important account may be cited from Hart's summary as follows:

Maximizing utilitarianism, if it is not restrained by distinct distributive principles, proceeds on a false analogy between the way in which it is rational for a single prudent individual to order his life and the way in which it is rational for a whole community to order its life through government. The analogy is this: it is rational for one man as a single individual to sacrifice a present satisfaction or pleasure for a greater satisfaction later, even if we discount somewhat the value of the later satisfaction because of its uncertainty. Such sacrifices are amongst the the most elementary requirements of prudence and are commonly accepted as a virtue, and indeed a paradigm of practical rationality, and, of course, any form of saving is an example of this form of rationality. In its misleading analogy with an individual's prudence, maximizing utilitarianism not merely treats one person's pleasure as replaceable by some greater pleasure of that same person, as prudence requires, but it also treats the pleasure or happiness of one individual as similarly replaceable without limit by the greater pleasure of other individuals. So in these ways it treats the division between persons as of no more moral significance than the division between times which separates one individual's earlier pleasure from his later pleasure, as if individuals were mere parts of a single persisting entity. (1983: 201-2)

The main opposition to this line of thought of utilitarianism is provided by theories which are pluralist and non-consequentialist in structure. The pluralists believe that more than one property is morally relevant. Traditionally, they also hold that there are a number of moral principles which are independent of each other and cannot be reduced to, or derived from, one basic principle. Examples from our ordinary moral thought would include 'Don't tell lies'; 'Don't steal'; 'Keep your promises'; 'Be fair'. According to the pluralists such principles can stand on their own feet and do not need to be backed up by appeal to the basic utilitarian principle. They may also hold that there is a plurality of values. Beauty, truth,

justice, for example, may be among the things we value, even when the pursuit of them does not necessarily maximize human happiness. (For this point, see McNaughton, 1988: 165) Here, this opposition to utilitarianism may be called agent-centered moralities. On such account the primary responsibility of each agent is to ensure that his own actions do not fall below certain moral standards, nor breach particular obligations he has to a specific person or group of people, even if he knows that the consequences will be worse if he refuses to compromise his principles.

The second influential objection to utilitarianism can be found in Rawls's account in his later writings. Rawls argues that utilitarianism gives no direct weight to considerations of justice or fairness in the distribution of goods. Provided that net aggregate satisfaction is maximized, utilitarianism is indifferent as to how satisfactions and dissatisfactions are distributed among distinct individuals. So if overall satisfaction will be maximized under an arrangement in which goods and resources are channelled to people whose circumstances are already comfortable, while other people are allowed to languish in abject poverty, then that arrangement is precisely the one that utilitarianism will recommend. Or if the total happiness can be maximally increased by denying freedom to a few, then that again is what utilitarianism will require. (See 1971: 22-7)

The third objection claims that utilitarianism is an excessively demanding moral theory, because it seems to require that one neglect or abandon one's own pursuits

whenever one could produce even slightly more good in some other way. While most people would agree that morality may sometimes require great sacrifices, many people would regard as excessive the idea that one may never devote time and energy to one's own pursuits unless there is no other way in which one could produce more good overall. (For this point, see Scheffler, 1988: Introduction, 3-4)

Utilitarians, however, counter the criticisms by arguing that, in order to avoid the difficulties encountered by simple utilitarianism, it is not necessary to accept a version of agent-centered morality. Those objections, they say, can be accommodated within a broadly consequentialist framework. Although there is disagreement among utilitarians about how best to do this, the following suggestions may be worthwhile noting.

First, R. M. Hare argues that adopting the theory of ideal spectator as an analysis of the nature of the moral point of view commits one to a particular moral theory - namely utilitarianism. (See Hare, 1973, in Daniels, 1975: 94) I doubt this claim. But why is this? Here, the ideal spectator theory aims to set a standard of correct judgment by defining the right attitude as the one that would be adopted by an ideal spectator. We have no idea what moral judgments the ideal spectator would make until we have given it content. The content may be provided by reflection on what distinguishes a moral attitude from other kinds of attitude. To adopt the moral point of view, it was suggested, is to have a disinterested concern with the welfare of all. The ideal spectator is thus sympathetic and

impartial. He will also, it was argued, be a utilitarian. His sympathy will lead him to desire people's happiness and his impartiality will ensure that he is equally concerned with the happiness of each. He will therefore approve most of those actions which will bring the greatest possible happiness to those affected by them. However, we would be right to be sceptical about this quick argument. The utilitarian is a monist and a consequentialist. But the impartial sympathetic spectator need not adopt either of those positions. It is simply question-begging to assume that his concern or sympathy for the well-being of humans would lead him to regard happiness as the only morally relevant property. He might well think that other values, such as justice, are important to human flourishing. Many critics of utilitarianism have pointed out that we are not only concerned with the amount of happiness but also with its just distribution. The ideal spectator could prefer a course of action which produced considerable happiness, fairly distributed, to one which would produce slightly more happiness, but at the expense of great unfairness in the way it was shared out. (For this point, see McNaughton, 1988: 167)

Secondly, some utilitarians suggest ways to accommodate distributive concerns in the evaluation of outcomes. They acknowledge that to a large extent, utilitarianism's vulnerability on the issue of distributive justice can be attributed to the specific way in which it evaluates outcomes. Given any two outcomes with different totals of aggregate satisfaction, in other words, utilitarianism will

always say that the outcome with the higher total is better, even if satisfaction is distributed very unequally in that outcome and much more equally in the other, and even if the difference in total satisfaction between the two outcomes is small. Contemporary utilitarians would agree that this is an implausible way of evaluating outcomes, but would insist that the natural solution is to substitute a principle of evaluation that is more sensitive to distributive concerns, rather than abandoning consequentialism altogether. As Scanlon points out, there are at least two ways to accommodate distributive concerns in the evaluation of outcomes. One is by giving extra weight to the interests of those who are worst off, so that the satisfaction of their interests counts disproportionately in determining what the best outcome would be in any given situation. The other is by treating distributive equality as a good in itself, which must be considered along with factors like net aggregate satisfaction in determining the value of an overall outcome. (See 1988: 79-80 and 86) Though these approaches seem to narrow the gap between consequentialism and agent-centered morality and to represent a development within the consequentialist thought that goes beyond the simplest formulations of the view, however, they are thought to constitute an intrinsically unstable compromise, which tries to occupy an apparently non-existent middle ground between the two seemingly incompatible moral theories.

Thirdly, other utilitarians, the so-called 'rule utilitarians' take a different view. They say that, unless

the result would be very bad, the right thing to do is to continue to act in accordance with the relevant rules and presumptions, even though this means doing less good than one could in these cases. For, they argue, while consequentialist reasoning determines what rules are justified and what presumptions should be encouraged, these rules and presumptions then take priority over case-by-case consequential calculation in situations where they apply. Scanlon argues that rights can best be understood on a 'two-tier' model of this kind. (See 1988: 82) However, here we can raise the same doubt to this attempt of rule-utilitarianism as that directed to the above-mentioned second attempt. I shall deal with this rule-utilitarianism later in more detail. (See Chapter 5, I.)

Notwithstanding the deficiencies of utilitarian consequentialism, the appeal to it persists, largely because the simple idea that derives its force from individual's prudential rationality continues to seem so plausible, and because the air of paradox surrounding agent-centered moralities remains so difficult to dispel convincingly. While agent-centered moralities have great intuitive appeal when applied to particular cases, however it also remains true that there are times when such moralities forbid us to do as much good as we could, or to prevent as much evil. Most starkly, it is perceived that there are occasions when one must not violate an agent-centered constraint even if that is the only way to prevent more widespread violation of the very same constraint by others. This apparent conflict between our moral intuition

of agent-centered morality and a very natural and familiar conception of rationality seems here to be exhibited.

Hence, this apparent conflict has led many philosophers to conclude that the most defensible moral view is probably some modified form of consequentialism, or reconciliation between the consequentialism and the agent-centered morality. (e.g., Rawls and Hart, see Chapter 5, I. Mixed Theories)

II. Expressive Theories and Teleological Communication.

A number of philosophers and legal scholars have pointed out a fact about punishment that had not been sufficiently appreciated by many traditional accounts, retributive, utilitarian, or 'mixed'. The point is that evil inflicted on the person punished is not an evil simpliciter, but rather the expression of an important social message - that punishment is a kind of language. (Igor Primoratz, 1989: 187)

That punishment has something to do with expressing condemnation or denunciation of the offense by society has been recognized by many authors. Accounts that point out this dimension of punishment are termed 'expressive' or 'denunciatory' theories. (See Walker, 1980: 28-30) One can analyze punishment as a practice that has this dimension, and even present it as the essence of punishment, without taking sides in the controversy about the moral justification of punishment. In such a case we have a view or account of punishment, but not a theory of punishment in

the sense usually assumed in the debates on punishment in moral and legal philosophy. (See, for example, Feinberg, "The Expressive Function of Punishment," in his 1970: chap.5)

But even if this expressive aspect of punishment is brought up in the context of discussion of its moral basis, there are two different ways in which this can be done. It may be claimed that punishment is justified as the expression of condemnation or denunciation, because that is how it serves its social purpose; or that it is justified as being in some way intrinsically right.

One could say, with J. F. Stephen, that society as a matter of fact feels hatred and vengefulness towards the offender, that this is 'a healthy natural sentiment', and that it ought to be given a socially recognized and regulated form in punishment rather than be left unchannelled and likely to break out in various disruptive ways. Or one could see this expression of condemnation of the offence in the light of its contribution to the moral education of society, as in A. C. Ewing's 'educative' theory of punishment. (See Ewing, 1929: Chap.IV; see also Hampton, 1984: 208-38) It could be claimed, with Durkheim, that the expression of moral condemnation through punishment serves to reinforce the 'collective consciousness' of society. An offence is, first and foremost, a violation of this consciousness; the latter "would necessarily lose its energy, if an emotional reaction of the community [i.e. punishment] did not come to compensate its loss and [this] would result in a breakdown

of social solidarity." (Durkheim, 1964: 108) Still another possibility would be to suggest some combination of these various uses of the expressive possibilities of punishment, as in W. Moberly's account of 'punishment as symbol'. (See Moberly, 1968: Chap.8) However, one could also put aside all such forward-looking, utilitarian considerations, and maintain that the expression of condemnation of the offence in the form of punishment is intrinsically right and called for. (For this point of 'intrinsic expressionism', see Primoratz, 1989: 196; see also Primoratz, 1987: 217)

Recently the expressive theory of punishment has been nicely reformulated by R. A. Duff. (See Duff, 1986: Chap.9) According to his account, punishment can be viewed as a communicative enterprise in which we engage with the criminal. Punishment aims to express to him the condemnation which his crime warrants; to communicate to him a more adequate understanding of the nature and implications of his crime - the injury he has done to others and to himself; to persuade him to repent his crime, and to accept his punishment as a penance through which he can strengthen and express his repentant understanding and restore himself to the community from which his crime threatened to separate him. But to talk thus of punishment as a reformative endeavour is not to suggest that it is a contingently efficient means towards a further and independently identifiable end: for the kind of reform at which punishment aims can be achieved only through the kind of suffering which punishment aims to impose on, or to induce in, the criminal. (Ibid. 267 and 234)

I think this version of the expressive function of punishment can complement the simple version of reciprocity theory of retributivism and make it a comprehensive account. Understanding punishment as a communicative enterprise, although it is not an independently justifying account, is not incompatible with the thesis that punishment should be basically inflicted according to an offender's deserts, and thus shall be taken as an integral function of teleological retributive punishment.

However, here is one problem. If we suppose that punishment has a part to play in moral education, what distinguishes this role, and in what conditions can punishment be expected to succeed in this? Several things must not be the case. First, the offender should not perceive his punishment simply as repayment, restitution, or compensation. Second, the culprit should not see the punishment simply as the expression of anger, which is a disturbing transitory state that eventually gives way to one of tranquility and amicability. And thirdly, the punishee should not understand his punishment as an unjust or improper penalty, thus as an undeserved treatment, which might be entailed from an arbitrary infliction of punishment violating the principle of proportionality.

As Elizabeth H. Wolgast points out, we come upon a curious inversion here: when we try to convey the moral message of punishment, the perspective of the one punished appears more important than that of the punisher. The child who is punished may sometimes grasp the intended message and the parent who punishes may see that the child has

understood, but even when the intentions of punishment are clear, the interpretation is not under the control of the punisher. It is not for the parent or other authority to define the meaning of the message and determine how it will be interpreted. (See Wolgast, 1987: 176)

What is involved when the punished child gets the moral message right? Some features seem obvious. First, the child who sees punishment as a kind of moral education already sees the parent as a moral educator. He sees the parent as having the status, as J. D. Mabbott might say, required to punish. (See Mabbott, 1972: 167. Mabbott, however, restricts the notion of 'status' to institutional contexts and maintains that there is no such thing as punishment apart from a system of institutional rules: "The only justification for punishing any man is that he has broken a law." 1972: 171-2) Parents are seen to have the authority and responsibility to punish, much as a judge has the authority and responsibility to sentence. Secondly, and relatedly, the child sees himself as morally imperfect, as capable of mistakes in judgement and in need of correction. So that even though he does not understand why what he did was wrong, he understands that he needs to learn why in order to conduct himself more acceptably in the future. (For these points, see Wolgast, 1987: 176-7) Here the precise point to be made is that only the just punishment inflicted by authority can convey a moral message to the punishee.

But on state-imposed punishments, Neil MacCormick argues that they require a more complicated account, because the state is an artificial rather than a natural person. Thus

here, the interrelated acts of many individuals and groups - legislators, prosecutors, judges, juries, and other officials - acting in their 'official' capacity in the criminal process of the state are imputed to 'the state' as its acts. (MacCormick, 1982: 32) Here, MacCormick gives the following reason:

[While] many human minds and wills must collaborate together in the criminal process, and the individual persons concerned have doubtless varying personal opinions upon moral and political questions, the acts of all the disparate individuals involved in the process, however, as organized activity, must cohere together under common or interrelated norms of official conduct. And the official conduct is directed by some supposed common purpose and expressive of what would be a single attitude were it possible for one individual to accomplish all (as could the paterfamilias of old within his own family). (1982: 31-2)

MacCormick expounds the common purpose by asserting that here the very facts which enable us to personify 'the state' and conceive of it as a single acting subject are the facts of coherently organized systems of action involving many individual human beings exercising various sorts of authority under law; Then the purposes and attitudes of the state are those postulated official purposes and attitudes which make rational the interrelated acts of officials - rational, because they can be understood as subserving some reasonably coherent scheme of values. (Ibid. 32; see also MacCormick, 1978: Chapt.7, on the notion of coherence in the value expressed within a legal system.) Here the scheme of values to be served by state-imposed punishments is, I would propose, justice or the common good.

However, as we have seen, the ability of punishment to

carry a moral message depends on the attitude of the punishee; it is thus a chancy kind of communication. The message won't be understood any more than the explicit message of a moral lecture, which might in any case be substituted for it. Walter Moberly says that: "the proper attitude towards flagrant wickedness is robust and militant. we do not feel this of the misdemeanours of small children, or of the feeble-minded, but... we feel it especially of deeds of cruelty or heartlessness, for here, most manifestly, the offender punished is reaping what he himself has sown." (Moberly, 1968: 81-2) The hardened criminal is the target of our fiercest condemnation. Besides taking a retributive stance in punishing him, we condemn him further by saying that he does not even mind being wicked! But as E. H. Wolgast correctly points out, that complaint tells a tale: if he lacks moral awareness, then he is beyond our means to help him even while we condemn and punish him. His position is little like that of a creature from another country or another planet. Would we punish such a creature, and if so, why? In the absence of the offender's understanding, punishment lacks its moral meaning, and thus lacks its important moral justification. (Wolgast, 1987: 182-3)

An offender's moral understanding needs to be seen, then, as an aspect of his membership in the community that he offends. If he is to feel guilt and to see his punishment as justified, he must see his actions from the viewpoint of others, including those who are offended by them. Thus taking punishment morally is linked to seeing oneself as a

member in a community. (For a recent view of constructing this kind of 'community conception' of punishment, see Lacey, 1988: chapt.8)

Some writers on punishment might refuse to give this linkage any importance. Mabbott, for example, writes: "I have treated the whole set of circumstances as determined. X is a citizen of a state. About his citizenship... I have asked no questions. About the government, whether it is good or bad, I do not enquire. X has broken a law. Concerning the law, whether it is well-devised or not, I have not asked... It is the essence of my position that none of these questions is relevant. Punishment is a corollary of lawbreaking by a member of the society whose law is broken." (See Mabbott, 1972: 174) Mabbott thinks that he has shown that punishment is justified solely by the violation of some law that pertains to the lawbreaker. The law itself, not membership in a community or a sense of it, is correlated with punishment in its full sense.

However, as E. H. Wolgast convincingly argues, it is evident that the law violated has its status as a law of a community that includes the offender at the same time that it punishes him. A wrongdoer is a part of a community, not an enemy or adversary, and it is simply as a member that he is punished. Mabbott should therefore think of the offender as related not only to the law but to the law in virtue of his membership in the community. (Wolgast, 1987: 184) But here the questions to be answered further are: what is the definition of community? And what are the proper contents of moral communication for the sake of community-concerned

justice and the common good? I shall deal with these points later. (See Chapter 6, V. and Chapter 7, III.)

I. Mixed Theories.

Given the problems of retributive and utilitarian theories in isolation, many theorists have sought to produce satisfactory accounts of punishment through hybrid theories which incorporate both types of argument, thus abandoning the attempt to find a single satisfactory principle. There are two basic models of compromise theory: for the first, utilitarian arguments are the fundamental part; for the second, the essence of the theory is a desert principle. (For this point, see Lacey, 1988: 46) The first type of theory essentially proceeds from the intuition that without some good compensating effects we cannot justify having institutions of punishment, but that we need to supplement or restrain the basic utilitarian principle with side-constraints in order to overcome utilitarianism's lack of a convincing principle of distribution.

(i) Rule-Utilitarianism. An attempt at a synthetic theory of punishment has been made in the context of developing rule-utilitarianism. The rule-utilitarian theory of punishment is meant to transcend the confrontation between utilitarianism and retributivism by providing a synthesis which is basically utilitarian, but makes room for consideration of justice and desert as well. (For this point, see Primoratz, 1987: 201) The most well-known attempt is that of Rawls in his paper, "Two Concepts of Rules." (Rawls, 1955: 3-13, in Acton, 1969: 105-14)

Rawls distinguishes between, on the one hand, the justification of a rule, or a practice consisting of a system of rules, or an institution, and on the other hand, the justification of a particular act falling under a rule or practice or institution. An analogous distinction is made, according to Rawls, between the roles pertaining to these two levels: the role of the legislator, who sets up the institution of punishment, guided by considerations of social utility, and that of the judge, who applies the rules of the institution to particular cases, giving offenders punishments prescribed by law for their offences and acquitting those proven innocent on the retributive basis. Rawls thus reconciles the utilitarian theory with the retributive theory by assigning them to different levels of justification and thus avoiding conflicts between them. Accordingly, this reconciliation is basically utilitarian, with retributive considerations being assigned a secondary, subordinate role.

Is this then, a successful synthesis of utilitarianism and retributivism, and a plausible view of punishment? The answer to this question will depend mainly on the capacity of this theory consistently to rule out punishment of the innocent and other kinds of unjust punishment. What reason would this theory give for holding to the rule that only the guilty are to be punished even in a case when the utilitarian aim of the institution of punishment, the prevention of crime, would be best served by making an exception?

Rawls contends that a utilitarian justification of an

institution for punishing the innocent whenever that is in the best interest of society - he calls it 'telishment' - is 'most unlikely'. (Ibid. 113) Why is it? For one thing, because the dangers of abuse by the officials of the institution would be great. This is not very convincing, as Igor Primoratz points out, for there are hardly any institutions which cannot be abused; we can assume, for the sake of argument, that enough reliable, honest people can be found to ensure that abuse is reduced to an acceptable minimum. (See Primoratz, 1987: 203)

Rawls's second reason is that in a society which replaced the institution of punishment as we know it by telishment, the uncertainty as to whether people fined, put in prison, or executed were punished or telished, and the unpredictability of one's own fate, with all the psychological and social repercussions of such a state of affairs, would be just too high a price to pay. (Rawls, 1955, in Acton, 1969: 113) However, all this would not be a consequence of the institution of telishment as such, but of the public knowledge about it. As a matter of logic, institutional rules have to be publicly known. Now this is right in the sense that an institutional rule cannot be private - known to one person only and secret with regard to everyone else. But this is not to say that they have to be public in the widest sense possible, that is, known to the whole public at large. The rules of telishment could be internal institutional rules - they could be known to the officials of the institution, but not to the public. Then those harmful consequences on which Rawls bases his claim

that telishment could not have a utilitarian justification would not be produced. However, the circumstances of limited and internal institutional rules which might provide for such justification of the rules of telishment would be the same as those which make a particular act of punishing an innocent man justified from the utilitarian point of view. They would not be transient, but would have a degree of permanence. Thus rule-utilitarianism does not really effect a synthesis of the utilitarian and retributive views of punishment; it does not really integrate retributive considerations in such a way as to avoid the commitment to socially expedient injustice in punishment. (See Primoratz, 1987: 204)

(ii) Hart's Separate Questions. Hart argues that the justification of punishment raises a number of different issues, and any account which gives a single answer - whether it be the pursuit of a single value or a plurality of values - to a single question is inadequate. (Hart, "Prolegomenon to the Principles of Punishment," in his 1968: 3) We have instead to look for different answers to different questions. Hart distinguishes between three such questions: first, what justifies the general practice of punishment?; secondly, who may be punished?; thirdly, how severely may we punish? The first question is about the general justifying aim of punishment, while the second and third questions are about its distribution which has two aspects: (a) liability (who may be punished?) and (b) amount (how severely may we punish?). (Ibid. 3-4 and 8-13) Hart maintains that the general justifying aim of

punishment is the utilitarian one of protecting society from the harm caused by crime, and not the retributive aim of inflicting pain on offenders who are morally guilty. But he points out that the pursuit of the general justifying aim has to be qualified by principles of justice which restrict the application of punishment to only those who have voluntarily broken the law.

Hart's views on punishment are rather similar to the rule-utilitarian account espoused by Rawls. But Hart's theory is different from Rawls's rule-utilitarianism which tries to show that the punishment of the innocent is not justified because the utilitarianly justified practice of punishment prohibits such punishment. Rawls distinguishes between different levels in a theory of punishment but believes that ultimately punishment is justified in terms of a single value, utilitarianism. Hart, on the other hand, maintains that there are a number of different issues in the justification of punishment, and there is no single value which can properly account for all the features of punishment that require justification. But Hart believes that although the principles of justice are independent of and sometimes conflicting with utilitarianism, their restriction of punishment to those who have voluntarily broken the law does not refute utilitarianism as the general justifying aim of punishment.

However, Hart's theory of punishment is exposed to some difficulties and objections. As C. L. Ten points out, the promotion of utilitarian values as the general justifying aim can come into conflict with the principle of justice in

distribution, and if the constraint imposed by this principle will have catastrophic results, then the principle may have to be sacrificed to public utility. So in extreme situations the theory allows for the possibility of utilitarian considerations overriding the principles of justice, and the scope of punishment will then be extended to cover the punishment of those who have not voluntarily broken the law. (Ten, 1987: 84) Also as Alan H. Goldman points out, the distinction in levels of justification between the institution and specific acts within it is a matter of degree (not a matter of separate property), since when justifying an institution, one must consider acts within it. (See Goldman, 1979: 42)

II. Teleological Retributivism.

The second type of mixed theory of punishment, with some variations in content and meaning, may conveniently be termed 'minimal retributivism', (See Golding, 1975: 100) 'weak retributivism', (See Lacey, 1988: 53-6) or 'teleological retributivism'. (See Ezorsky, 1972a: Chap.II; Nozick, 1981: 372) This is the thesis which regards desert of unpleasant treatment as a necessary but not a sufficient condition for punishment: an offence provides the state with a reason, but not a conclusive reason for the infliction of punishment. This is also sometimes expressed as the principle that offences give the state a *prima facie* right to punish, but not a duty to do so. However, having a *prima facie* right to do something is not in itself a

sufficient reason for doing that thing; it can be overridden by other reasons, most obviously by other right-based arguments.

This weak retributivist argument is in a sense the converse of Hart's compromise theory: the latter focuses on a utilitarian rationale for the institution of punishment, using the retributivist principle as a constraint upon the pursuit of the utilitarian goal. The weak retributivist view regards punishment in accordance with desert as the central justifying factor, whilst requiring (at least on some versions) a utilitarian justification for the infliction of punishment in individual cases. Utilitarian factors such as deterrence, reform, prevention and so on thus can act as a limitation on the desert principle.

III. Teleological Desert Theory.

Now it is worthwhile to summarise my version of the teleological retributive theory. The teleological retributive theory employs the concept of desert itself as a primary justifying rationale and the function of moral communication, rather than the traditional utilitarian purposes, as an inherent but a subordinate element of punishment. A communicative component is a defining characteristic of punishment and in part distinguishes it from mere retaliation or acting out of revenge where the goal of bringing about evil for another may achieve all that one desires. (For this point, see Morris, 1981: 264) Doing so will open the way to showing that the retributive

desert principle implies the three sub-principles, namely, desert, responsibility and proportionality. The moral communication principle involves a teleological notion of reforming the offender and reconciling between the offender and the society through a communicative act, and thus functions as a limiting principle which limits the application of the proportionality principle.

Accordingly the teleological retributive theory can be clarified and worded as follows: (Compare with M. M. Falls's 'the moral accountability theory'. see Falls, 1987: 41)

(1) In the first category as to the principle of retributive desert:

(i) Punishment is justified if it is one's earned moral desert. (Principle of Desert)

(ii) Punishment is one's earned moral desert if and only if one has voluntarily done a wrong. (Principle of Responsibility)

(iii) The severity of punishment that is one's earned moral desert is the degree of severity proportionate to that of the wrongdoing. (Principle of Proportionality)

(2) In the second category as to the principle of moral communication:

(iv) Punishment is justified if the one suffering it remains capable of reflectively responding to the treatment being received and the condemnation it communicates. (Principle of Moral Communication)

The teleological retributive theory unqualifiedly

prohibits torture and any other inhumane and cruel punishment which makes a moral communication impossible. (For this point, see Morris, 1981: 270) This is because in order to be justified in accordance with the intrinsic worth of persons, punishment must hold the criminal responsible, and to hold the criminal truly responsible it must demand and allow response as a moral agent. Thus, to the list of three principles of retributive desert, a fourth teleological principle of moral communication should be added. (See and compare with M. M. Falls's theory, 1987: 47; From the principle of respect for persons, Falls deploys a concept of 'unearned moral desert' of the same import as the intrinsic worth of a moral agent. Although it seems persuasive, I hesitate to extend the use of desert with such a wide import, and instead follow the ordinary usage. James Rachels explicitly discounts any desert save earned desert in his article, 1978: 150-63)

The fourth principle does not contradict the proportionality principle even though it significantly limits its legitimate application. The proportionality principle is solely about earned moral desert, and according to it torture, death, whatever, may be the earned moral desert of the most wicked. The fourth principle, the limiting principle, says something to limit this, intending the prohibition of torture and any other inhumane and cruel punishment. It intends to say that whatever one's earned moral deserts are, the state justifiably administers them only if doing so serves rather than undermines the practice of holding one responsible. If the earned moral deserts are

of such a kind or degree of severity as to violate the limiting principle, then the only thing the state can justifiably do is to approximate proportionality without destroying the intrinsic worth of moral agency.

Thus far, my account of the teleological retributive theory has consisted in an analysis of certain terms revealing that autonomous moral agents of intrinsic worth deserve to be held accountable by the state, and that the state does this when it punishes in accordance with the three retributive desert principles plus a fourth teleological principle. In other words, punishment is justified if and only if it is based on (1) the principle of retributive desert and (2) the principle of moral communication. In this account, the two principles - each of those as a necessary condition - function jointly as the necessary and sufficient conditions for a justified (here in the sense of 'just') punishment. Hence this account can be conveniently called a 'teleological desert theory of punishment'.

Two recent writers have made interesting moves in this direction, J. R. Lucas, who once argued that we must understand punishment in essentially deterrent terms, now wants to place more emphasis on its retributive, communicative and penitential purposes. (Lucas, "Or Else" for the earlier account; *On Justice*, 1980: Chap.6 for the new account. For this point, see Duff, 1986: 235) Herbert Morris, on the other hand, once argued that punishment could restore an abstract and 'rule-established balance of benefits and burdens', but could not restore those 'close

relationships defined by feelings and attitudes' which are essential to our personal and social lives, and which wrongdoing disrupts. More recently, however, he has canvassed a 'paternalistic theory of punishment' which, based on retributivism with some form of utilitarianism, stresses the idea of punishment as a complex communicative act and makes a concern for the criminal's moral well-being and for his relationships with his fellows, central to its meaning. (Morris, "Persons and Punishment," for the earlier account; and "A Paternalistic Theory of Punishment," for the new account.)

IV. Just Desert and Principle of Proportionality.

IV.1. Measuring Just Deserts.

We accepted the principle of proportionality for measuring just deserts. That principle requires the severity of punishments to be in proportion to the seriousness of crimes. As punishments usually consist of imprisonment, it seems to be easy to measure a proportional punishment by length of time incarcerated according to the seriousness of crimes. There is, however, no definite demarcation test, to give a yes or no choice between those who are incarcerated and those who are not but given probation, suspended sentence, or some other non-custodial penalty.

The first approach to the principle of proportionality is to understand whether this is identical with the principle of equality or equivalence, and if not, how it differs from

the latter. With a method of comparison between good or bad desert and counterpoising reward or punishment, it seems initially appropriate to employ the principle that crime and punishment should be equal or equivalent. Many of those who support capital punishment for murder would invoke this principle of equality or equivalence, namely, the Kantian version of the *lex talionis*: an eye for an eye, a tooth for a tooth, and a life for a life. With the Kantian equality principle, however, it is often impossible to determine a punishment equal to a crime. Although capital punishment might be equal to murder, what punishment would be equal to rape? How can we punish a kidnapper according to the *lex talionis*, if he has no children of his own? Thus the Kantian principle of equality should not be understood in the letter but in the other way - only in the spirit. In that spirit, Kant actually recommended castration as the appropriate punishment for rape. (Kant, *The Metaphysical Elements of Justice*, trans. John Ladd, 1965: 132-3) Then, Kant's principle might better be called one of equivalence. Yet, one needs some basis for determining when a punishment would be equivalent to the wrong done.

One way of ensuring the equivalence is to repeat what the offender has done with the roles reversed. Just as one can repay the borrowed sugar by returning something else deemed to be equivalent, so too it might be thought that punishment gives offenders their just deserts if it inflicts on them the degree of suffering which is judged to be equivalent to the suffering caused by their respective crimes. Interpreted in this manner, as C. L. Ten points

out, the principle resembles the utilitarian doctrine in some respects in that it reduces both the crime and the punishment to a common denominator, the suffering caused, against which they may be compared. (Ten, 1987: 153) But it differs from utilitarianism in insisting that the punishment must be equivalent to the crime irrespective of the consequences produced by such equivalence. So even when a lesser punishment will serve to reduce crime more effectively than a greater punishment, the latter is still to be meted out if it is the deserved or equivalent punishment.

This view of measuring just deserts is deficient and thus unacceptable since the principle that crime and punishment should be equivalent, like the *lex talionis*, focuses on the harm or suffering caused by the crime, and ignores the mental state of the offender. But any attempt to remedy the principle by taking account of the offender's culpability will destroy the principle. For now the common denominator of suffering caused is not the only relevant consideration. Suffering caused by deliberate acts calls for greater punishment than the same suffering caused by merely negligent acts. Here we need to examine the principle of proportionality which has been designed to solve this problem by combining both elements, namely, harm and *mens rea*. Then what is the principle of proportionality? A simpler version of the principle of proportionality can be interpreted as a method that we are able (i) to compare different offences in respect of their relative gravity, and (ii) to compare different penalties

in respect of their relative unpleasantness - and surely we can presume to make such comparisons in many, if not all, cases.

IV.2. Two Scales in the Principle of Proportionality.

Most contemporary retributivists settle for the proportionality principle that the amount of punishment should be proportionate to the moral seriousness or moral gravity of offences, with the more serious offences being punished more severely than the less serious. The application of the proportionality principle involves constructing two ordinal scales, one of punishments and the other of crimes. Punishments are ranked in order of severity, and crimes are ranked in order of moral seriousness. The most severe punishment on the scale is reserved for the most serious offence, the next most severe punishment for the second most serious offence, and so on. In general the ranking of punishments in order of severity seems relatively easy compared with the assessment of the relative moral gravity of offences.

Although there are no clear-cut ways to rank crimes, according to the retributivist, two irreducible and incommensurable factors appear to be involved in determining the seriousness of criminal conduct: the harm and the mental element. Mental states can be ranked in declining order as purposely, knowingly, recklessly, negligently, and none of them (strict liability). The ranking of mental states, from least to greatest culpability, can be illustrated by the following examples

of automobile driving resulting in death. Strict liability: X is carefully driving down the road, just having had his car repaired and safety inspected, when a pot hole covered by snow causes a nondefective tire to blow causing the car to slide uncontrollably into and killing a pedestrian walking along the edge of the highway. Negligently: X forgets to have a safety inspection and his brakes fail at a traffic light resulting in his running down a pedestrian crossing with the light. Recklessly: X knew his brakes were defective and drove anyway, resulting in a fatal accident as for negligence. Knowingly: X is driving away from a bank robbery when a police officer steps into the road, and X runs the officer down without any attempt to avoid doing so. (Reckless drivers do attempt to avoid hitting people when the risk materializes.) Purposely: as in television detective shows, X swerves onto the sidewalk to run down his worst enemy. As one goes from strict liability to purposefulness, X poses more of a threat to security - from doing everything possible to avoid harm to deliberately causing it.

The ranking of harms, on the other hand, is not easy. The death of a person is worse than loss of a hundred pounds, but is it worse than a violent rape not resulting in death? A controversy would arise: many people would agree because of the paramount importance of life, but perhaps other many people would disagree because of their sympathy with the agonizing feeling and ensuing trauma of the victim. Perhaps more difficult is distinguishing harms in crimes like bribery, theft, and wiretapping. It is not feasible to give

each harm a separate and distinct place on the scale. Instead, a 'partial ordering' dividing harms into groups ranked in order of seriousness would be the best possible in a practical sense. (See von Hirsch and Jareborg, 1991: 17-35)

To sum up, according to the retributivist's account of just deserts, the moral seriousness of an offence is a function of two major factors - the harm done by the offence and the culpability of the offender as indicated by his mental state at the time of committing the offence. Other things being equal, killing is more serious than assault, and intentional killing is more serious than negligently causing death. The interplay of these two factors, harm and culpability, is important, and it is often not possible to know the full significance of one factor without reference to the other factor. When told that a person has deliberately or recklessly caused harm, we do not know how serious the offence is unless we also know the extent of the harm. But another important problem to be solved here is: when we take both factors, harm and culpability, into consideration for testing the moral seriousness of crime, how is the moral seriousness of conduct to be assessed objectively?

IV.3. Assessing the Objective Seriousness of Criminal Conduct.

How can we assess the objective seriousness of criminal conduct? Can we lay down standards which are definitive? Or should we accept that such standards will vary with time

and place? If there is no consensus on the gravity of every different crime, then, the crucial question will be whose standards are decisive in grading seriousness of particular conduct. Public opinions and attitudes on the significance of an individual crime appear to change with varying degrees over time and place. At least we can say that criminal codes and the penalties they lay down are an expression of political interests at a particular time and place. Nowadays in the highly-industrial society where people live an individual life facilitated by the division of labour, burglary and cognate offences to the individual interests are considered to be more serious offences than the so-called 'white-collar crimes', even though the amounts of money involved in the latter exceed by a considerable amount those taken by more conventional criminal means. Social security fraud is regarded as more heinous than tax evasion. Thus, the social environment and political values at a given time which provide a basis for grading of seriousness should not be overlooked.

Although with the importance of a standard in assessing the objective seriousness of criminal conduct, there seems no convincingly comprehensive and coherent theory developed to deal with this matter. Only a few attempts to develop a reasonable account for this problem have been made recently and among them, two are found particularly worth examining.

One interesting exploration of the problem is by Claudia Card. (See her monograph, 1973: 17-35) She interprets the problem of proportionality in terms of what she calls 'the Penalty Principle' and 'the Full Measure Principle'. The

former states, in part, that a punishment is retributively just only if it imposes on an offender a deprivation of rights to the extent of his "evident culpable failure to abide by the law". The latter requires that the hardship to which he is thus exposed does not exceed "the worst that anyone could reasonably be expected to suffer from the similar conduct of another if such conduct were to become general in the community". By the Penalty Principle, Card incorporates the idea that wrongdoing is a function of two independent components: a factor internal to the offender, namely mens rea, malicious intentions, motives, or reasons for inflicting (or attempting to inflict) culpable injury on others; and a factor external to the offender, namely the harm caused to the victim. As we can recognize, this Penalty Principle seems no other thing than the principle of proportionality itself we have established so far. Thus the only remaining thing in Card's account worth examining is the Full Measure Principle.

There also arise baffling difficulties, as Card herself recognizes, over interpreting the Full Measure Principle. "The Full Measure consists in a deprivation of rights exposing the offender to a hardship comparable in severity to the worst that anyone could reasonably be expected to suffer from the similar conduct of another if such conduct were to become general in the community." (Ibid., 27) The purpose of this principle is to explicate the intuitively sound requirement of retributivism, that a just punishment consists in "a suspension or withdrawal of rights of the offender corresponding to his failure to respect such

rights of others".(Ibid., 32) To apply this principle and identify a punishment as just or deserved for a given crime or for an offender who is guilty of that crime, we must have some way of measuring the hardship or loss of rights suffered by the victim.

Consider the crime of rape. How much hardship would this crime involve were it to become general in the community? What would we undertake to examine in order to assess and measure that hardship? Would it be the victim's feelings, such as how much the assault hurt, or the victim's reactions, such as the subsequent self-imposed restrictions on freedom of movement, or the victim's judgments, such as the loss of self-esteem, or all of these together? Would the hardship take into account the victim's status, such as whether she was a child, a prostitute, a spouse, or other effects upon the victim, such as her prior virginity or subsequent pregnancy? Card does not tell us, and so we are not clear what would be the appropriate degree or kind of suffering to legislate for the generality of rapists "comparable to the worst that anyone could reasonably be expected to suffer" were rape to become general in the community. But one important lesson we can draw from Card's argument is that a measurement of the objective seriousness of crime should ultimately rely on public opinion or sentiment. And public opinion or sentiment on any criminal conduct is such a kind which is not formed in a particular circumstance but in a generalized social context of that crime. Then the method for achieving objectivity Card argues in her Full Measure

Principle seems to be a similar approach to the ideal impartial spectator's standard which is espoused for a just decision-making by moral sentimentalists since Adam Smith.

However there appears one slight difference in connotation between these two methods. It seems to me that the Full Measure Principle regards public opinion or the sentiments formed in a generalized context as a source of objective justice while the impartial spectator's test does not rely on public opinion or sentiment in a given political community but presupposes a universal, ideal situation for decision-making. But I do not know whether there will be much differences between two methods in their practical application since any particular decision-making under each test requires a universalization within a given political community with any scale. Accepting for the moment this idea about universalized public opinion, I shall next examine an attempt which tries to apply this kind of approach in a more concrete and empirical way.

This kind of approach is offered by Andrew von Hirsch, in what he calls 'the principle of commensurate deserts'. According to this principle, "severity of punishment should be commensurate with the seriousness of the wrong... seriousness depends both on harm done (or risked) by the act, and on the degree of the actor's culpability." (von Hirsch, 1976: 66 and 69) Von Hirsch relies on the techniques for measuring degrees of gravity of offences worked out by the criminologists Sellin and Wolfgang. (See Sellin and Wolfgang, 1964) They rank-order criminal offences to the degree of severity, and they do this by

means of a scale with 26 equal intervals on which they plot judgments drawn from a large sample of persons reflecting their assessment of amount and relative degree of harm done by a wide range of crimes. The Sellin-Wolfgang findings were subsequently criticized on the grounds that their sample was unrepresentative, formalistic and inflexible since they provided, for example, no way of distinguishing murder from manslaughter, for harm is their criterion, not culpability. (See Freeman, 1983: 416) But von Hirsch, relying on the similar results with a more representative group which a sociologist Peter Rossi obtained later, maintained that a substantial degree of consensus was found in the ranking of the crimes; and there was comparatively little variation in response among different racial, occupational, and educational subgroups. (von Hirsch, 1976: 78-9; see also Rossi et al, 1974: 224-37) He went on to assert that whatever the complexities in the concept of seriousness, such studies suggest that people from widely different walks of life can make common-sense judgments on the comparative gravity of offenses and come to fairly similar conclusions.

The incorporation of the Sellin-Wolfgang research by von Hirsch raises questions: (i) he focuses too much on judgments about harm and not enough on judgments about culpability; (ii) whether the criteria and validity of relying completely on public opinion in the assessment of seriousness of crime is tenable for these may be questionable either because they contain factual misjudgments or because they involve moral judgments that

do not withstand scrutiny.

Von Hirsch himself acknowledges these problems and replies that: (i) if we are fully agreed that it would be helpful to have information available about how ordinary people rank criminal conduct, we can develop new research that is better designed to elicit people's common-sense judgments about culpability; (ii) we should give serious considerations to the popular judgments, not necessarily abide passively by them; it is because of this kind of thinking that even if surveys found that the crime of burglary was regarded as quite serious, that would not settle whether it should be treated as such. (See von Hirsch, 1978: 623)

This leaves the question of how the criteria for seriousness should be constructed. If seriousness is a notion without objective quality, it is a perceived objective seriousness that is at issue. Public opinion and sentiment can therefore not be ignored. Then, a satisfactory theory and practice whose soundness is only based on a rational practical reasoning for a universalized public opinion will help solve the issue.

Perhaps, the idea of fair market value that is commonly made use of in appraising property is illuminating here for our method of identifying the universalized public opinion. The process of calculating deserved punishment which is in proportion to the culpability of the criminal conduct seems to bear marked similarities to that of fair market value. Then, what is the fair market value and how is this determined?

According to Hyman Gross's account, it is universally agreed that proper judgments of fair market value are rational judgments based on considerations generally accepted as determinants of worth in the market community. Some such notion as the price at which a willing buyer and a willing seller engage in a transaction is used, and fair market value can thus be seen to depend on the normal dispositions and attitudes of those who make a market in a community at a given time. (Gross, 1979: 439)

However, the question to be raised here is: how is the objective criteria for determining fair market value and the objective process for it formed?

Several things seem important here. Though the criteria of value make reference to presumed dispositions of members of community, to be objective criteria, they make reference only to dispositions that can be rationally defended. Though market value from time to time tends to reflect people's subjective factors, the objective criteria do not depend upon what those who make up some representative cross-section of the community would in fact be disposed to offer or accept, but rather upon what any member of the community would be bound in good conscience to admit is a fair price once he has considered carefully all those things that bear on it. And finally, though judgments of fair market value again reflect opinions that within reasonable limits will inevitably differ depending on who is making the judgment, there are ways of criticizing and defending opinions by appeal to reasons, and so there are ways of deciding which opinion is best. (See Gross, 1979:

If the above analogy between the measurement of objective seriousness of crime and that of objective fair market value of property is plausible, we can draw an idea about what is objective public opinion with regard to crime and punishment. The standard of fair punishment which is in proportion to the culpability of the criminal conduct can be an objective one if it depends not on what most people feel like seeing the perpetrator suffer, but rather upon what is defensible through reasoned argument. It is not then the bare opinion of some majority that prevails, but a considered judgment that any one may arrive at. (See Gross, 1979: 440)

To sum up the discussion so far, even though Card's formulation is too imprecise to afford any real guidance, one important point which focuses on public judgment in generalized context is worth exploring. The approach to obtain an objective test based on empirical and scientific survey on public common-sense judgment, which is espoused by von Hirsch, is a more advanced one but still needs further development. Gross's analogy between the determination of fair market value of property and that of fair punishment seems persuasive but still stops short to any concrete application. Nonetheless, I suppose this approach is the right direction to pursue.

If one were able to develop a scale of seriousness, there comes the further problem of matching a scale of penalties with it. Here, Bedau objects that more than one penalty scale could satisfy the requirements of proportionality,

and concludes that any proposed scale would therefore be 'arbitrary'. (See Bedau, 1978: 615)

But why must one assume that the proportionality principle should yield a single unique solution? As von Hirsch argues, we are better to recognize that the principle imposes only certain 'outer' constraints on the over-all magnitude of the penalty scale, but leaves some choice within those constraints. (See von Hirsch, 1976: Ch.11) It is appropriate to have ranges of possible punishment for each category of crime rather than one fixed amount. If one does not, then one must sacrifice utilitarian considerations of specific deterrence, incapacitation, and reform. Not all instances of assault and battery are alike; they can differ by the amount of harm inflicted and other circumstances, such as a barroom brawl versus a random vicious assault. As Michael D. Bayles maintains, individualization of punishment is to be adopted: laws should permit, and judges should impose, individualized punishment within maximum and minimum limits for each crime. (Bayles, 1987: 342) Thus, the average sentence should be less than the maximum permissible to allow for aggravating and mitigating considerations. As a possible convict, one would want and accept attention to mitigating features of one's case. Nor could one rationally object to a greater than average punishment based on aggravating factors so long as the punishment was no more than the maximum permissible. The minimum amount of punishment helps ensure that prevention is not unduly weakened.

I. Desert as constituting a prima facie obligation for reward and punishment.

According to the principle of desert, it is held that virtue deserves reward and vice punishment. Does this mean that it is obligatory for the virtuous man to receive reward, and the vicious punishment, i.e. that someone has an obligation to give them what they are said to deserve? Difficulty arises with ill-desert. If a man has deliberately done wrong when he could have done right, we say he deserves punishment, but does this mean or imply in every case that someone has an obligation to punish him? The trend of modern consequentialist accounts is that the actual infliction of punishment is to be justified only if it will lead to a balance of good, that it is to be justified by utilitarian considerations of deterrence and reform. Where there is an obligation to punish, therefore, the obligation ultimately depends on the future good consequences of the act. But the teleological desert theory of punishment clearly opposes this account. The statement that a man deserves punishment is justified by the fact that he has deliberately and knowingly acted contrary to what was his duty. But, to say that he deserves punishment cannot mean the same as saying that someone has an obligation to punish him (although, someone ought to punish him.), for the two statements differ in their implications. (Though the terms 'duty', 'obligation', and

'ought to do' are often used interchangeably by philosophers, the expression 'ought to do', however, in our more careful ordinary discourse, is used in a wider sense to cover things we would not regard as strict duties or obligations or think another person has a right to. (For the difference in moral connotation between 'obligation' and 'ought', see Frankena, 1973: 47; Williams, 1981: Chapter 9) To understand better the different implications, we need to examine at least four different accounts of the notion of desert. These different approaches to desert can be stated briefly as follows. (For this point, see Mackie, 1986: 623-4)

(i) Negative retributivism: One who is not guilty must not be punished since he has no ill desert.

(ii) Permissive retributivism: One who is guilty may be punished according to desert. You must not punish the innocent, but you may punish the guilty; you must not punish excessively, but you may punish up to a proportionate degree. This permissive account does not say that wrong acts are positively a reason for imposing penalties; but it does say that wrong acts somehow cancel the basic reason for not imposing penalties; the guilty person loses his immunity in proportion to his guilt. (For examples of this view, see Raphael, 1980: 40; Garcia, 1989: 263)

(iii) Prima facie positive retributivism: One who is guilty ought to be punished according to desert. This is only a weak, prima facie obligation for punishment. (For an example of this view, see Hestevold, 1987: 257)

(iv) Positive retributivism: It is obligatory that one who is guilty be punished according to desert (in every case). This is an absolute requirement for punishment. (For this point of strong or maximal retributivism, see Kant's, Hegel's and Bradley's theories)

My position is that a desert-claim constitutes a *prima facie* obligation to act. It is only a necessary, but not a sufficient condition for the complete moral justification of punishment. It is, however, a necessary and sufficient condition for justice under the teleological desert theory explicated before. But justice is not the whole of morality, only a part of it. Thus the complete justification of punishment (and also, reward) has to be viewed as a two-stage procedure, the first stage dealing with justice, the second with the common good.

What does this mean precisely? Desert provides only a valid basis for claims, but these claims are, though crucially important, not necessarily or even usually claims against or binding on particular individuals. Nor do they always entail an obligation to act towards someone as that person deserves. (See Galston, 1980: 176; Similarly, Brian Barry argues that ascribing desert to a person for a some facts about him gives a necessary but not a sufficient condition. see Barry, 1965: 106) In a more concrete account, when we say that an especially hard-working self-employed farmer deserves to succeed, or that a person of fine moral character deserves to fare well, we typically do not mean that anyone is absolutely obligated to take steps to provide what is deserved. Similarly, when we say

that a superior athlete deserved to win a contest he lost on a fluke, we do not imply that anyone has absolutely failed to act as he should have. In these and many other cases, desert does not squarely bear on anyone's conclusive obligations. (See Sher, 1987: 5)

Feinberg gives a similar account. According to him, that a subject deserves X entails that he ought to get X in a *ceteris paribus* ('other things being equal') sense of 'ought', but not in the 'all things considered' or 'on balance' sense. This is simply another way of saying that a person's desert of X is always a reason for giving X to him, but not always a conclusive reason, that considerations irrelevant to his desert can have overriding cogency in establishing how he ought to be treated on balance. (See Feinberg, 1970: 60)

Consider following cases from John Kleinig, for example. Kleinig argues: (i) "If jailing a man for theft would (because of prison conditions) endanger his life, then, provided that other possible means of punishment were also open to objections, we could argue that he ought not to be punished [on balance], even though he deserved it. We would probably ask that his sentence be suspended." He further argues, (ii) "Similarly, were the punishment of a convicted spy likely to trigger off a nuclear war, then we would have a ground for saying that he ought not to be punished [on balance]. But this would in no way eliminate the fact that he deserved to be punished." (Kleinig, 1971: 76)

Although Kleinig does not give a clear account why reasons other than desert would prevail in above cases, it

seems to me that social necessity or some significant aspect of general welfare places obstacles in the path of desert and thus justice. The occurrence of serious emergencies, such as war, civil strife, or natural catastrophe, may require the taking of expeditious measures which may be questionable from the vantage point of justice, or which may violate a law considered fair and reasonable under ordinary circumstances. (For this view, see Bodenheimer, 1967: 112) St. Thomas Aquinas said: "So if a case crops up in which the general good would be harmed by observing the law, the law must not be observed... Only when the danger is urgent and allows no time for recourse to such higher authority does necessity itself, which knows no law, dispense us." (St. Thomas Aquinas, *Summa Theologiae*, Part II, Chapter 9. Law and Grace, Qu.96, Art.6, 1991: 292)

Let us take an example for this case. The problem of necessity was squarely posed in World War II when the Japanese-Americans were evacuated from the West Coast of the United States and removed to relocation camps in the interior. The military authorities defended the measure by asserting that there existed a serious threat of Japanese invasion of the Pacific Coast, that the loyalty of the Japanese-Americans was under a cloud, and there was no time to separate the reliable from the unreliable elements by a screening process. If these facts had been borne out by the record, the obvious injustice done to loyal Japanese-Americans might have found its justification in pressing military necessity. (The existence of a serious invasion threat at the time of the evacuation and the

charge of wide-spread disloyalty among the members of the group were, however, questioned by a number of authorities after a thorough analysis of the facts and records.) (See Rostow, 1945: 489; see also 1944: *Korematsu v. United States*, 323 U.S. 214)

But here for a more proper understanding of desert (also, justice) as a *prima facie* obligation, I think it is worth while examining an act of mercy which has been considered according to differing theorists, on the one hand, as a supererogatory benevolence, and on the other hand, as a special softening case of legal justice and thus an element of desert. If an act of mercy could be understood as a part of desert, then it would be a *prima facie* obligation to exercise mercy. Let us examine this issue more in depth.

II. Justice and Mercy.

If we take desert to be the all-important reason for just punishment, then will an act of mercy, which apparently involves the imposition of less than the just penalty or less than the deserved punishment on an offender, be unjust and wrong? And is this not contrary to our deepest moral convictions of desert? Mercy seems to contradict justice, or desert. Something of this is caught by the old-fashioned schoolboy's description of his stern headmaster as 'a beast, but a just beast'. In this case, is a 'just beast' actually 'just' and thus a virtuous type of human being?

Mercy has always stood as high in the moral scale as justice - indeed, even higher. Aristotle himself placed

greater value on equity than on strict justice (*The Nicomachean Ethics*, Book V. Chapter 10) Equity, of course, is not the same thing as mercy; but in as much as it aims, or should aim, at mitigating harsh consequences, it partakes of the same quality. (See Allen, 1958: 56 n.) However mercy might be thought to be the dictate of that part of morality which lies in benevolence, and therefore should not be considered a part of justice itself.

The contention that mercy does involve a compromise of justice would seem to follow from such a statement that "to be merciful is to let someone off all or part of a penalty which he is recognized as having deserved" (For this point, see Armstrong, 1961: 487); or Alwynne Smart's claim that 'genuine mercy' involves the 'imposition of less than the just penalty' or 'less than the deserved punishment on an offender.' (Smart, 1968, in Acton, 1969: 217 and 224)

Here to understand the nature of mercy properly, it would be useful to distinguish the criminal law paradigm of mercy from the private law paradigm of mercy. (For this point, see Murphy, 1986: 9-12) With the criminal law paradigm of mercy we think of mercy as a virtue that most typically would be manifested by a sentencing judge in a criminal case. With the private law paradigm of mercy as typically represented in *Merchant of Venice*, the central focus is a contract dispute. In that play, Antonio has made a bad bargain with Shylock and, having defaulted, is contractually obligated to pay Shylock a pound of his flesh. Portia, acting as judge, asks that Shylock show mercy to Antonio by not demanding the harsh payment.

Murphy argues that this private law case differs radically from the criminal law case. His accounts are as follows: "A judge in a criminal case has an 'obligation' to do justice - which means, at a minimum, an obligation to uphold the rule of law. Thus, if he is moved, even by love or compassion, to act contrary to the rule of law - to the rules of justice - he acts wrongly (because he violates an obligation) and manifests a vice rather than a virtue. A criminal judge, in short, has an obligation to impose the just punishment; and all of his discretion within the rules is to be used to secure greater justice (e.g., more careful individuation). No rational society would write any other 'job description' for such an important institutional role." (Murphy, 1986: 10) From this reason he suggests that the criminal law paradigm of mercy is a failure. Although it appears to be persuasive, I can not accept his argument in detail. But before elaborating this argument further, let us see his account of the private law paradigm.

Murphy argues that in the private law paradigm, the virtue of mercy is revealed when a person, out of compassion for the hard position of the person who owes him an obligation, waives the right that generates the obligation and frees the individual of the burden of that obligation. He gives following account: "a litigant in a civil suit is not the occupier - in anything like the same sense - of an institutional role. He occupies a private role. He does not have an antecedent obligation, required by the rules of justice, to impose harsh treatment. He rather has, in a case like Shylock's, a 'right' to impose

harsh treatment. Thus, if he chooses to show mercy, he is simply 'waiving a right' that he could in justice claim - not violating an obligation demanded by justice... I do not necessarily show a lack of respect for justice by waiving my justice-based rights as I would by ignoring my justice-derived obligations." (Murphy, 1986: 10)

I agree with Murphy about the moral virtue of mercy in the private law case - this private law paradigm of mercy, I would call a 'genuine mercy' or 'supererogatory mercy'. However, I still think there is room for mercy as an important moral virtue with impact upon the law in the criminal law case - this criminal law paradigm of mercy, I would call 'judicial mercy' or 'equitable mercy'. Hereafter I shall discuss this latter kind of mercy in order to understand the relationship between justice and mercy.

To place this problem in its proper perspective, we need to look briefly at the language of mercy employed even in the criminal cases. As John Kleinig points out, the view that mercy involves giving someone less of an ill than he deserves, while true in some instances, is unnecessarily restrictive. (Kleinig, 1973: 87) Judicial mercy, as Alwynne Smart shows, arises when a guilty man has such extenuating circumstances or has suffered so much already as the result of his crime, that the judge sets in motion the machinery to obtain a sentence lower than the existing law allows - this act is called a recommendation of mercy. He may also speak of showing mercy when he imposes less than the maximum penalty for a crime, but again only implying that the accused's crimes or his circumstances do not justify

the full penalty. (See Smart, 1969: 213 and 221-3) In these cases mercy is but a mitigating factor in the law or a standard term used in explaining a reduced punishment. Its use implies the acceptance of reduced culpability or some other excuse as a factor to be taken into account in arriving at a fair sentence. We speak of mercy 'tempering' or 'seasoning' rather than 'replacing' or 'opposing' justice. Then the showing of mercy does not necessarily involve a compromise of justice. Let us examine cases of judicial mercy more in depth.

The contexts in which we commonly talk about and recommend mercy are many and varied, and some seem more appropriate than others. It is more appropriate to speak of mercy in respect of some murderers rather than others. This is sometimes because one kind of murder is intrinsically worse than another. Suppose, for example, that in a particular State, the penalty for murder is death or life imprisonment, with no provision for lesser penalties. Suppose a man discovers that his wife is unfaithful to him, and blind with uncontrollable anger and jealousy, he shoots her with a rifle that happens to be lying around. Now take another case - the case of a man who murders his wife for her money after weeks of careful planning. We believe that coldly premeditated murder for personal gain is morally worse than heat-of-the-moment murder and that it warrants a harsher penalty. We might consider the full penalty prescribed by the law to be the right punishment, be it death or life imprisonment. It is generally felt that heat-of-the-moment murder does not warrant the same

punishment and one would expect the jury to add a recommendation of mercy to its verdict. Thus it is right to say that mercy ought to be exercised in such a case, even if it is difficult to reach agreement on what penalty should be imposed instead. The reason why mercy ought to be exercised is that the penalty as it stands is too harsh for the particular offence. To treat these two kinds of murder as being of equal gravity and warranting identical penalties would be a great injustice, one into which the crudeness of the law would force us if there was no provision for mercy riders. (See Smart, 1969: 212-3)

In actual legal matters, we can find that many recommendations for mercy are supported on grounds which constitute not so much a deviation from moral justice, but an adjustment to moral justice. Although it is one of the functions of laws to give a practical and efficient means of judgment, legal judgments, however, frequently fail to take into adequate account the special circumstances surrounding individual cases. In such cases pleas for mercy are entered, so that all morally relevant circumstances might be taken into account in the final sentencing. This is especially noticeable in cases where the judge has no alternative but to pass the death sentence. (See Kleinig, 1973: 88)

Here Claudia Card rightly argues that mercy is deserved in those cases: "Mercy ought to be shown to an offender when it is evident that otherwise (i) he would be made to suffer unusually more on the whole, owing to his peculiar misfortunes, than he deserves in view of his basic

character and (ii) he would be worse off in this respect than those who stand to benefit from the exercise of their right to punish him (or to have him punished). When the conditions of this principle are met, the offender deserves mercy. Although desert of mercy does not give rise to an obligation, it can present a case sufficiently strong to outweigh the initial justification for punishing and allow us to discriminate among offenders without violating the rule of justice." (Card, 1972: 184-5; For the view of mercy as desert, see also Armstrong, 1961: 487; But for an opposing view, see Sadurski, 1985: 240) As Card goes on to maintain, mercy can be the form of charity specifically deserved, as punishment can be the form of social justice specifically deserved in certain situations. By contrast with punishment and reward, mercy is deserved on the basis of what one has endured and the nature of one's moral character on the whole, rather than on the basis of individual performances or omissions. (Card, 1972: 198) I think her argument is convincingly plausible and can be adopted here for our account. I would call this kind of criminal law paradigm of mercy an 'equitable mercy'. It may clarify this view to point out its similarity to Aristotle's view of the relation between two kinds of justice - equity and legal justice. In much the same way, we can understand judicial mercy as an expression of justice, a perfection of justice.

However, it might also be argued that mercy is not justified if it involves unfair discrimination against others. If a judge has before him two cases which are

identical in all relevant respects, and exercises mercy in one case but not in the other, he could rightly be criticised for showing favouritism and committing an injustice. If he is going to let one off lightly he ought to let the other one off lightly too, and equally lightly. (Smart, 1969: 218-9)

III. Desert, Justice and Utility.

If we understood desert as constituting a *prima facie* obligation to make proper, or appropriate reward and punishment, then, a question arises: what about considerations of utility in the course of final judgment? Is utility to be considered as the ultimate reason after desert is taken into account? This is a matter of relationship between justice and utility. In our ordinary thoughts, we find that we do want just punishments to be useful as well, and useful laws to be just as well. However, useful laws cannot always be just, and just punishments cannot always be useful. One can define away the possible conflict and identify justice with usefulness only if one ignores the frequent competition between laws, or sentences, which might be useful by bringing future benefits and what is felt to be just, i.e. deserved by past guilt. This competition occurs, as van den Haag correctly points out, because in practice legislators, who prescribe punishments, do not focus exclusively on usefulness, and courts, which distribute penalties, do not confine themselves exclusively to justice. When the phases of the

criminal justice system are not wholly separate - and they can never be altogether discontinuous - the demands of justice may compete with the requirement of utility. (See van den Haag, 1975: 26)

Utilitarians attempt to answer this problem in the following way. They hold that punishment is justified solely by its consequences. The idea of ill-desert, included in that of punishment, is a concealed way of referring to, and achieving, good consequences. (For this point, see Feinberg, 1970: 80-83)

Recently this utilitarian view on deserved reward has been expressed by Anthony Quinton. Quinton, like J. S. Mill, argues that the idea of desert and justice is not an independent moral principle to be employed in distribution but rather something that can be interpreted in utilitarian terms. (See Quinton, 1989: 77 and 79) Let us examine his view by using his own example of the distribution of oranges in society. Since his description of the example is not in detail, I shall elaborate his case in his utilitarian terms for the sake of discussion.

If we focus first our attention on the matter of production of oranges in society, as opposed to their distribution, we may see that the idea of utility would operate in this circumstance. If we envisage that oranges are produced by individuals who cultivate orange trees, and that this process of cultivation involves, as it must, effort and disutility on the part of the cultivators, then, in our judgment about the distribution of oranges, we may have to take this disutility into account. If a cultivator

produces two oranges and he is interested in consuming all, then it would not normally maximize his utility to transfer one orange to someone who has not contributed to cultivate that. This is because the cultivator might see the consumption of oranges which he had grown as a compensation for the disutility and effort involved in the cultivation of them.

In this case, Quinton's view is that "it would be no injustice if he [the laborious cultivator] were to eat both [of the oranges] and not give half of his crop to another man who happens to be passing by at the time when it becomes ripe... To bring him up to the normal level of satisfaction, which the passer-by may be presumed to enjoy, he needs both oranges." (1989: 77)

In the above account, Quinton's view of desert and justice may be interpreted rather like entitlement on the ground that the cultivator has expectation about what he ought to receive as a reward for the labour and contribution to the production, otherwise he would not have undertaken that. Here, the claim of justice, according to Quinton, is interpreted in utilitarian terms.

In a market economy, it is assumed by utilitarians that people are rewarded according to their effort and contribution; the larger the contribution they make to the total system of production, the larger their rewards are expected to be; since their greater efforts contribute to the growth of the economy and therefore greater aggregate satisfaction of wants, their greater rewards are considered just on the ground that they are entitled to get back their

due share of the contributed utility even though this will lead to inequalities of various sorts. (For this kind of account, see Plant, 1991: 160) I shall refute this view shortly by pointing out the deficiencies in its underlying assumptions.

However, according to the utilitarian theory of desert, a similar account, *mutatis mutandis*, would be given of deserved punishment. when we say a man deserves punishment, the whole meaning of our statement can be resolved into two clauses: (i) he has done a wrong action; (ii) it is useful to apply certain punishments to him - useful, that is, in the way of influencing his habits and other people's. The utilitarian theory will make deserving a four-termed relation - A, the agent, deserves P, the penalty, because C, the consequence of P, tends to discourage W, the wrong act. (For this point, see Duncan-Jones, 1952: 137-40) In other words, when we say that the punishment 'fits' the crime, we are referring, not to any specifically ethical relation between them, but simply to the causal property which the punishment has of tending to remove or repress the harmful tendency. (For this theory of punishment and reward, see Nowell-Smith, 1954: 273; see also his article, 1948)

Now, the objections to this account, as D. D. Raphael maintains, are twofold. (See Raphael, 1980: 38-9)

(i) Punishment and reward are not the sole type of action (or indeed of painful and pleasureable action) that is useful in averting public harm or promoting public good. Quarantine is useful in averting public harm, and it

happens to involve, as imprisonment designedly includes, the experience of isolation, which to most people is unpleasant. Instruction makes people useful to society, and to some it is pleasant (and so like reward), to others painful (and so like punishment). Taking medicine benefits society as well as the patient, since a sick person is a burden on society; and it may be unpleasant. Yet it is not called punishment. Sermons are intended to strengthen our morality, to reinforce our virtue and to correct our vice; the virtuous may perhaps find them gratifying, and the vicious may find them tedious. Are we to say that sermons are rewards to the one and punishments to the other? We can not say so. But a difficulty for utilitarian theory is that it tends to assimilate to punishment all other ways of prevention of social harm and reform, and this is open to criticism. This defect of the utilitarian analysis of desert constitutes our first objection.

(ii) On the utilitarian theory of desert, we should have to say, where any action causes the removal of an undesirable tendency or the strengthening of a desirable one, not only that the action is to be called punishment or reward, but that the person to whom it is directed 'deserves' it, since the propriety or fittingness of desert simply expresses this causal relation, in the same sense in which medicine is appropriate for the cure of sickness. Indeed, we might say that the sick person 'deserves' his medicine. But we do not in fact use the language of morality in such circumstances. When we speak of desert we imply that the agent knew what he was doing, could control his action at

that time, and was aware of a right and a wrong. We say that, according to the teleological desert theory, punishment is justified when it is just and beneficial as well.

However, to explicate the teleological desert theory better, it will be illuminating to compare it with the 'permissive desert' theory espoused by D. D. Raphael.

IV. Permissive Desert versus Teleological Desert.

Raphael argues that he can agree with the utilitarian theory of punishment to the extent of thinking that where there is an obligation to punish, the obligation arises from utility. The strength of the so-called retributive (or, as he prefer to call it, the desert) theory of punishment lies, not in the justification of a positive obligation to punish the guilty, but in the protection of innocence. (Raphael, 1980: 39) The utilitarian theory requires us to say, when "it is expedient that one man should die for the interest of society at large", that he deserves this as a punishment. It is here that common sense protests against the injustice of utilitarianism, and it is here that the retributive theory of punishment has greatest force.

Raphael maintains: "Punishment is permissible only if it is deserved. But this does not of itself give rise to an obligation to punish. An obligation to inflict punishment, where punishment is permitted by desert, arises from the social utility of its infliction. Where a person is guilty

of having wilfully done wrong, he has thereby forfeited part of his claim to be treated as an end-in-himself; in acting as a non-moral being he leaves it to open to his fellows to use him as such." (Ibid. 40) He goes on to assert: "If it should be thought necessary to override the claim of the individual for the sake of the claim of society, our decision is coloured by compunction, which we express by saying that the claim of justice has to give way to that of utility. Where the individual has been guilty of deliberate wrongdoing, however, his claim not to be pained is thought to be removed; there is held to be no conflict of claims now, no moral 'obstat' raised by justice to the fulfillment of the claim of utility. This thought is expressed by saying that the individual 'deserves' his pain, and the pain is called 'punishment', which is simply a way of saying that in this situation the infliction of pain, for the sake of social utility, involves no trespass on the claims of justice, no conflict between utility and justice. Justice is 'satisfied' by the 'punishment', for justice has not, in the circumstances of guilt, a countervailing claim that would have been breached by pursuing the path of utility." (Ibid. 40-1)

Raphael's accounts of 'permissive desert' and the relationship of justice and utility are, I think, unconvincing. His arguments have at least two defects: (i) the defect of utilitarianism in general as the primary justifying factor, namely, the problem of incommensurability of value or human good, and (ii) the absence of any clear account of the principle of

proportionality in the amount of punishment, which will be an equally crucial question when justice and utility conflict. Before proceeding to a deeper analysis of these problems, let me propose the basic viewpoints of the 'teleological desert theory'.

Here my argument is in a sense the converse of Raphael's permissive desert theory. The permissive desert theory focuses on the utilitarian rationale for the infliction of punishment, using the desert-claim as a constraint upon the pursuit of the utilitarian goal. The teleological desert theory regards punishment in accordance with the teleological notion of desert as the central justifying factor, whilst permitting a utilitarian justification (at least in some versions) in individual cases. Utilitarianism thus acts as a supplement or a limitation (e.g. in cases of an immediate, overriding concern for social security) on the desert principle.

It does not follow from this viewpoint of utilitarianism as a supplement (or, a limitation) that deterrence, reform of the criminal, and prevention of crime and social protection are undesirable functions of criminal policy or that they should be given no weight in the debate about appropriate punishments. However, they cannot constitute the supreme justification of punishments but rather they are to be seen as the desirable by-products of a system of punishment. Since desert is interpreted, under the teleological desert theory, as an essential constituent of justice and since according to desert what is due to it is considered as a communicative enterprise conveying a sense

of justice, a deserved punishment itself involves some beneficial consequences by virtue of being a moral communication. We may hope that just punishments will help to attain utilitarian goals, and we should adopt methods which facilitate the likelihood of achieving them. It is hard to deny that utilitarianism has a strong persuasive power as a moral theory since it takes its root in a forward-looking insight about maximizing social utility. However, the problem of the utilitarian approach is that it tends to neglect the individual value and human right of moral agents since its main orientation is to maximize total value no matter what kind of distribution this entails. Therefore, if justice is considered to be the basic criterion of appropriate punishment, utilitarian considerations should be taken into account in so far as they do not conflict with the just verdict and sentence based on guilt.

In practice, it may be concluded that while the justice principle provides the basis for singling out, condemning and taking punitive action against the offender, the choice of particular forms of punitive action may depend upon utilitarian considerations. (See and Compare von Hirsch, 1976: 55; see also Galligan, 1981: 160) The retributive desert does not make a distinction between a fine, compulsory labour or imprisonment as long as these burdens are equally proportionate to the crime. As Sadurski argues, if one form of punishment is just while another form of punishment is equally just and, in addition, brings about beneficial social consequences, the latter punishment

should be chosen. (Sadurski, 1985: 256) The withdrawal of a driving licence may be equally as burdensome for an offender as short-term imprisonment; retributive desert will give no guidance as to which of these penalties should be chosen but the teleological desert theory may give some guidance by way of introducing the element of moral communication. In actual cases, the appropriate decision should, if possible, promote both justice and utility.

Here, one plausible account of combining both retributive desert and teleological consideration may be given by the criminal cases with regard to a possible distinction between the case of complete but unsuccessful attempt and that of complete crime. The reason why we may better make a distinction in punishment between attempted and completed crimes is that by doing this we can satisfy not only the requirement of retributive justice but also that of teleological element of moral communication both of which are comprised in the principle of teleological desert. How can we justify this? It may be doubtful since there seems to be no difference in wickedness and thus guilt, though there may be in skill, between the successful and the unsuccessful attempt. (See Hart, 1968: 129)

Here, if we take personal choice and voluntary conduct seriously as the theorists of retributive desert suggest, we might face a perplexing issue of why a failed attempt can count as a lesser offence and be punished less severely than the relevant complete offence. We can perhaps suspect that the mere fact of failure in a criminal attempt cannot show the agent to be any less deserving of punishment, or

to deserve any less punishment, than one whose similar criminal endeavour succeeds.

Imagine a case in which Jack and Tom each fire a shot at an intended victim: each intends, and makes a competent and whole-hearted attempt, to kill. But while Jack succeeds in killing his victim, Tom fails to kill his not because his attempt is incompetent or half-hearted, but because his victim moves suddenly, or is saved by unexpectedly prompt medical treatment. The difference between their two endeavours, such that one succeeds while the other fails, is thus purely a matter of chance or luck: so they are surely equally culpable, and deserve equal punishment; for it cannot be just to make the extent of an offender's criminal liability depend on the chance fact of whether he actually caused the harm which he tried to cause. If punishment should depend on desert, it should, we might argue, depend on culpability rather than on the actual causation of harm; on what the criminal wrongfully chose or tried to do, not on the chance matter of what harm he actually did.

An argument which I shall suggest here is that the ideas of just desert and retributive justice may not allow us to punish attempts less severely than completed crimes. However, the idea of teleological desert (or due desert) and furthermore the higher principle of common good might allow a reduced punishment to criminal attempts with a teleological consideration of beneficial effects both to the criminal and the society. We can approach this issue in two ways, from the basis of two elements of crime, a

subjective (in the sense of mental operation) and an objective one (in the sense of physical sequence).

First, as to the matter of desert, we must now attend to the subjectivist argument that there is no difference in culpability, and should therefore be no difference in criminal liability, between a failed attempt and a completed offence. What distinguishes Jack's action from Tom's? Not their subjective character: each intends to kill his victim, and does what he thinks will kill a person. If we describe their two actions from the agent's own subjective viewpoint, our description will be the same in each case, since such descriptions are independent of what objectively happens. Whether the shot hits or misses; whether the victim dies or is saved by prompt medical treatment: both Jack and Tom try to kill, since both intend to cause death by their actions. The one vital distinction between them is that in one case the killing has not been brought off. This distinction makes Jack guilty of murder and Tom guilty only of attempted murder: but it depends on the objective rather than on the subjective aspects of their conduct. Whether an action counts as an attempt to kill depends essentially on its subjective character: but whether that attempt succeeds or fails depends on the objective matter of what actually happens.

This objective distinction between Jack and Tom, however, is only a matter of chance, which depends on factors (such as whether or not the victim moves) outside the agent's control. Justice requires that criminal liability should depend on voluntary choice and desert, not chance: on what

an agent freely and responsibly does, not on what happens as a matter of chance; on what is within his control, not on factors lying beyond his control. Liability may thus be determined by the subjective aspects of the agent's action, not by its objective aspects: for what he chooses to do, what is thus truly his as a responsible agent, is his action as subjectively described. An attempt to save someone that fails through no fault of the agent's is as morally commendable as one that succeeds: for the agent has done what he can to save life. He is commended for the subjective character of his action, as one of saving life, since it is this which he chooses and controls: its objective character, as a failure to save life, lies outside his control and cannot detract from his moral credit. Analogously, Tom can take no moral credit for the failure of his attempt at murder since his complete attempt is equally as dangerous and harmful to society as Jack's successful crime: that failure cannot reduce his culpability, nor, therefore, should it reduce his criminal liability.

However, in a complete justification of punishment by maintaining the legal distinction between attempted and completed crimes, we need to show that the objective aspects of the defendant's conduct can make a relevant difference to the moral character of his action, and to his own moral and legal standing as the agent of that action: but how could this be shown?

A possible answer may be given by the consideration of some forward-looking policy, for example, in the interest

of controlling the victim's resentment. Since the resentment felt by a victim actually injured is normally much greater than that felt by the intended victim who has escaped harm, it will be a social interest to control that greater resentment by differentiating the punishment between two cases - namely giving a severe punishment to the completed crime and a less severe one to the complete but unsuccessful attempt. (For this kind of account, see Hart, 1968: 131) This view has an insight by giving a due consideration to the social aspect of crime but stops short to the crucial aspect of moral communication which punishment is designed to bring forth.

A more plausible answer may be this. One, if not the only, essential purpose of criminal punishment is to communicate to the offender, and to the wider community, a proper condemnation of his crime; a condemnation which answers to the character and seriousness of the wrong which he has done: we want him to come to understand, and to repent, his crime for what it was. Now if the law punished failed attempts as severely as completed crimes, the message which it communicated would be that it does not matter to the law whether an attempt to commit a criminal wrong succeeds or fails: it would be saying to the man who failed in his attempt to injure his victim that his crime was just as serious as that of someone who succeeds in causing grievous injury to another person - that it does not matter that he actually failed.

But our intuition says that it does matter to us, and should matter to him, whether his attempt succeeded or not:

we are, and he should be, relieved that it failed (for if he comes to repent his crime as he should, he will be relieved that it failed); and if his punishment is to communicate to him an adequate understanding of his crime, it should surely aim to communicate the appropriateness of this relief. But this is precisely what the distinction between attempted and completed crimes achieves. (For this kind of account, see Duff, 1990: 191)

We can hope with this distinction to communicate to a criminal the appropriateness of that relief, and bring him to share it. This answer can be understood from a perfectionist conception of the proper purposes of criminal punishment, namely, one according to which the goals of punishment are to bring not only the restoration of social equilibrium disrupted by criminal wrongs but also the reconciliation and education of the criminals and the community.

V. Justice, Utility and The Common Good.

Let us examine further the relationships among justice, utility, and the common good. Here the primary concern is with the criteria for determining the common good, since both justice and utility are considered to be its constituent parts. As is to be expected, there exists no unanimity of opinion as to the criteria which are to be used in specific situations in order to determine the common good. But here our starting point is an intuitive idea that the evaluation of a human community is properly

directed to the way of life enjoyed by the individuals comprising that community. Then a question to be raised is: What is a good community?

We may say, as Galston asserts, that a 'good community' provides a way of life in which each individual realizes the human good to the greatest extent possible for that individual. In such a community, the only limitations on achievement of the good would be internal obstacles - genetically stunted capacities or psychological characteristics that interfere with self-development and the enjoyment of existence. And furthermore, the good community can be said to rest on three preconditions: nonscarcity; members who rationally respect one another's interests; and suitable relations with other communities. (See Galston, 1980: 192) Here I conceive that the notion of the human good is comprised in four elements: the value of self-preservation; the value of self-fulfillment; the value of happiness and harmony; and the value of practical reasonableness. (See and compare Galston, *ibid.*, Chapter 3. Elements of the Human Good; see also Finnis, 1980: Chapter IV. 2, The basic forms of human good)

By contrast, a 'just community' allocates the human good or the means to it in accordance with valid claims. The just community is distinguished from the good community in at least one of two respects: the existence of relative scarcity, or the presence of some individuals whose acts or qualities limit their valid claims to less than what is required for the greatest possible achievement of their good. (Remember Hume's or Rawls's notion of 'the

circumstance of justice' in which the existence of relative scarcity is presupposed.)

Based on above preliminary sketches on the relationship between a just community and a good community, I shall examine the notion of the common good (or, in other interchangeable words, 'the common interest', 'the public interest', or 'the general welfare'). Four basic approaches can be suggested for dealing with the problem: (i) The first approach is purely formalistic and simply identifies the common good with the aggregate of authorized governmental decisions and actions. (ii) The second approach is procedural and considers the common good test fulfilled when fair methods of procedure are used in arriving at authoritative decisions. (iii) The third proposed solution is thoroughly individualistic and utilitarian and equates the common good with the arithmetical sum total of individual interests. (iv) The fourth is normative and perfectionistic, in that it proceeds from the conception of a public order which aims at the realization of certain goal values assumed to have objective validity. (For these four approaches, see and compare Bodenheimer's accounts of the 'public interest', Bodenheimer, 1967: 127)

V.1. The formalistic approach.

At first sight this approach to the common good problem would seem to satisfy the legal positivists who advocate an 'command theory' of law. It is because those theorists tend to identify any legal power and policy decisions of the

government authorities with the legitimate interests of the state as well as the governed. But this approach is unsatisfactory. As Bodenheimer similarly argues, it cannot be conceded that the common good consists in whatever the public authorities by their fiat declare it to be. If the organs of government were always and necessarily endowed with the will to accomplish as well as the capacity to discern the best interests of the community unfailingly and without deviation, then perhaps there would be room for an identification of the public interest with governmental decision-making. But under the conditions of the actual world, every informed person is well aware of the fact that this identification is without a rational basis. Government officials may misconceive the community interest, make serious and unquestionable mistakes in framing and executing public policies. They may also be motivated by selfish desires in exercising their responsibilities and interpret their functions purely in terms of personal advancement or aggrandizement of power. Thus we can not be confident with an assertion that the common good coincides with the policy decisions of the public authorities. (See Bodenheimer, 1967: 127-8)

V.2. The Procedural Approach.

Secondly the purely procedural interpretation of the common good is likewise subject to objections. Let us take an example of this point of view briefly. Benn and Peters argue: "To seek the common good means to try to act justly and is not of the same type as 'maintain full employment'.

Whereas the latter is a counsel of substance, the former is one of procedure." (Benn and Peters, 1959: 273) In other words, they maintain: "To seek the common good does not describe a determinate goal at all. It is an instruction to approach policy-making in a certain spirit, not to adopt a determinate policy. To say that the state should seek it is to say only that political decisions should attend to the interests of its members in a spirit of impartiality." (Ibid.)

As H. L. A. Hart points out, this identification of the common good with justice is not universally accepted since justice in a sense of impartiality is regarded at least as a necessary condition to be satisfied by any legislative choice which purports to be for the common good. (See Hart, 1961: 163 and 252) An impartial method of decision-making is not necessarily a guarantee for the promulgation of laws or policies which promote the general welfare. For example, the practice of holding hearings at which interested parties are given an opportunity to express their views on proposed legislation, though it is quite desirable from the viewpoint of procedural due process, has not brought about unfailing excellence of legislation in democratic states. We are well inclined to think that in addition to procedural fairness some consideration of substantive justice and the practical reasonableness of goal-achieving-endeavour should be brought into the situation.

In the political community, as Finnis asserts, the common good is said to be the securing of a whole ensemble of

material and other conditions that tend to favour the realization, by each individual in the community, of his or her personal development. Then the common good refers to the factor or set of factors which, as considerations in someone's practical reasoning, would make sense of his collaboration with others and would likewise, from their point of view, give reason for their collaboration with each other and with him. (See Finnis, 1980: 154) This collaborating endeavour, on this view, aims at the well-being and flourishing of all members of the community.

V.3. The Utilitarian Approach.

Thirdly it is also not tenable to assert a congruence of the common good with the sum total of private interests. It was Bentham who put forth this equation in his social philosophy. (See Bentham, 1982 edition: Chapter I, 1-7) He was convinced that the pursuit by each individual of his private utility would necessarily advance the general utility and result in the greatest happiness of the greatest number. J. S. Mill developed this point further in a more sophisticated account. Mill distinguishes the standard of justice which should be applied in the framing of laws from the origins of the sentiment of justice which are to be found in 'the impulse of self-defense and the feeling of sympathy.' (Mill, 1962: 306) The standard he advocates is social utility. He goes on to assert: "the justice which is grounded on utility to be the chief part, and incomparably the most sacred and binding part, of all morality. Justice is a name for certain classes of moral

rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life." (Ibid. 315-6)

One can well agree with Mill that justice refers to that area of social conduct which is of particular importance for the effective and harmonious operation of the social system, and that the norms of conduct postulated by justice deserve to be invested with an obligatory force of particular strength. But the further question remains whether the standard of utility advocated by Mill is or is not the most satisfactory one that can be employed in the solution of the problems of the common good. The criterion proposed by him and Bentham was whether or not a particular legal measure served to increase pleasure and decrease pain; and it was his own as well as Bentham's view that which enhanced the pleasure and happiness of an individual was generally, though not necessarily, apt to promote the happiness of the social body as a whole. This idea of hedonistic utilitarianism which is based on the empirical premise that pleasure alone is good as an end offers much ground for doubt and criticism.

From a simple psychological observation, we can acknowledge that the basic assumption of the hedonistic utilitarianism, pronounced as a universal truth, does not stand unbiased scrutiny. From the teachings of Aristotle, St. Thomas Aquinas, T. H. Green, through contemporary perfectionist philosophers, we are informed that man is a goal-seeking being. Here the goals he pursues are no doubt

manifold and highly diversified, including many objectives other than pleasure. Producing serious works of art, literature, architecture, and engineering often involves much toil and renunciation of comfort. We can find, as another example, that mountaineers undertaking difficult ascents often have to overcome obstacles of an extremely arduous nature. It might perhaps be contended that such ventures are embarked on for the sake of the ultimate pleasure of having accomplished one's objectives. But as Erich Fromm convincingly points out, pleasure is not a primary motive of action, but merely a potential companion of productive activities. (See Fromm, 1947: 175-180) Similarly John Dewey maintains that a clearcut distinction must be made between pleasure and happiness by saying that "pleasures are so externally and accidentally connected with the performance of a deed, that attempting to foresee them is probably the stupidest course which could be taken in order to secure guidance for action." (Dewey, 1960: 39)

We are now in a position to grasp an idea that, when man's striving becomes directed exclusively at the seeking of pleasure, the result will often be frustration accompanied by neurotic symptoms, rather than satisfaction and joy. It is interesting to note that J. S. Mill himself became aware of the deficiencies of a hedonistic philosophy after many years of serious intellectual journey. In his autobiography he wrote: "I never, indeed, wavered in the conviction that happiness is the test of all rules of conduct, and the end of life. But I now thought that this end was only to be attained by not making it the direct

end. Those only are happy (I thought) who have their minds fixed on some object other than their own happiness; on the happiness of others, on the improvement of mankind, even on some art or pursuit, followed not as a means, but as itself an ideal end. Aiming thus at something else, they find happiness by the way." (Mill, 1944: 120)

The foregoing rejection of a hedonistic utilitarian philosophy as an ultimate gauge of law and legislation should not be taken as a suggestion that lawmakers ought to be unconcerned about human happiness. The true happiness of the human-being must be the lodestar for all those who are engaged in building the good society. But the readiness to bear hardships and make sacrifices for the sake of attaining the higher goals of life might be a necessary condition for the realization of genuine contentment and psychic harmony. Truly as Fromm asserts, we can say that the opposite of happiness thus is not grief or pain but depression which results from inner sterility and unproductiveness. (See Fromm, 1947: 190)

What ultimate conclusions regarding the relationships among justice, utility, and the common good can we distill from these considerations? In sum, we are able to see that a concept of utility which rests on a universalist form of hedonism can not be deemed adequate for the accomplishment of the aims of justice and the common good.

V.4. The Normative Perfectionist Approach.

Finally after eliminating the deficient approaches so far examined, the only feasible method of determining the

common good would be the elaboration of certain normative standards which may be of use in the appraisal of public policies. Generally speaking, these standards cannot be quite different from the criteria which should govern the realization and administration of justice in a political community. The concept of the common good is, however, somewhat broader than the notion of justice because it must also include measures that are dictated by inescapable social necessity or overriding efficiency and utility, although they may be limited in applicability and questionable from the vantage point of justice.

Let us now remind ourselves that the state which proclaims to promote the principle of common good as its fundamental goal tends to interpret the principle in favour of advancing its own interest. But here if we fail to grasp the fact that this good of the social body is also the common good of human persons, as the social body itself is a whole made up of human persons, this formula would lead in its turn to other errors, of a collectivist type - or to a type of state despotism. The common good of society is neither a mere collection of private goods, nor the good proper to a whole, which draws the parts to itself alone, and sacrifices these parts to itself. As Jacques Maritain argues, the common good involves, as its chief value, the highest possible attainment (that is, the highest compatible with the good of the whole community) of the good by persons in their lives as persons, and in their freedom of self-expansion or autonomy. (See Maritain, 1971: 9)

As the upshot of the discussion so far, we can see its three characteristics of the common good. A first essential characteristic involves recognizing that the common good is actively created by citizens participating together in some shared process. This view of the common good implies that the public domain - people's life together as part of the same society - demands a shared debate, negotiation and decision-making over issues of justice, freedom and equality. Unless these common interests are fostered by active participation, individuals will relapse into competitive self-interest, and élites will use power on behalf of interest groups. (For this point, see Jordan, 1989: 85) A second characteristic relates to authority in society. The common good is the foundation of authority; for indeed leading a community of human persons towards their common good, towards the good of the whole as such, requires that certain individuals be charged with this guidance, and that the directions which they determine, the decisions which they make to this end, be followed or obeyed by the other members of the community. A third characteristic has to do with the intrinsic morality of the common good, which is not merely a set of advantages and conveniences, but essentially integrity of life, the good and righteous human life of the multitude. Justice and moral righteousness are thus essential to the common good. That is why the common good requires the development of the virtues in the mass of citizens, and that is why every unjust and immoral political act is in itself harmful to the common good and politically bad. We can also see how,

because of the very fact that the common good is the basis of authority, authority, when it is unjust, betrays its own political essence. (For these points of a second and a third characteristic, see Maritain, 1971: 9-11)

I. Autonomy and Desert.

When we argue for a non-institutional conception of desert as an essential criterion of justice, we need to demonstrate how this argument is to be justified. Tackling this question requires a substantive moral inquiry. As we shall see, any kind of approach to desert-based justice presupposes both a particular vision of the self and a specific view of the social relations of persons. Thus my central aim here is to display the underlying justification of desert-claims by a normative inquiry into personal identity, personal autonomy, and the nature of a person's social relations. Let us first examine the notion of personal autonomy.

It seems safe to say that there is a generic feature of every desert-claim that is morally significant. This is the connection between desert and autonomous action. Thus, as James Rachels points out, treating people as they deserve is one way of treating them as autonomous beings, responsible for their own conduct. A person who is punished for his wrongdoings is held responsible for them in a concrete way. The recognition of desert is bound up with this way of regarding people. (See Rachels, 1978: 159) But this suggestion, though sensible, is far too weak to justify any specific desert-claim. To do that, the desert-autonomy link must provide some positive reason for persons to have what they are said to deserve. Since it is

widely agreed that persons ought to have and exercise autonomy itself, the most natural way of giving such a reason is to argue that the value of a person's acting autonomously is somehow transmitted to, or inherited by, what he is said to deserve. In other words, it may be possible to infer from the premise that it is good that persons act autonomously the conclusion that it is good that they have certain things that flow from their autonomous acts.

How can we make this argument work? To do so, we must show, first, that autonomous acts have real value, and second, that the link between such acts and the outcome we take to be deserved is a suitable conduit for this value. At first, few would deny that persons ought to be able to choose and act autonomously since we can hardly say that it is a good thing when someone else can determine our own fate. We can easily observe that in democratic societies at least this particular conception of human well-being based on self-determination and personal life-plan has acquired considerable popularity. It is the ideal of personal autonomy. The ideal of personal autonomy is, stated briefly, the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.

Furthermore, as Raz points out, this is an ideal particularly suited to the conditions of the industrial age and its aftermath with fast-changing technologies and free movement of labour. Industrial and post-industrial societies do call for an ability to cope with changing

technological, economic and social conditions, an ability to adjust, to acquire new skills, to move from one subculture to another, to come to terms with new scientific and moral views. (See Raz, 1986: 369-70)

The next question to answer is how the value of autonomous acts is transmitted to particular outcomes. Why should the value of anyone's exercise of autonomy mean that he should have one thing rather than another? Indeed, however valuable autonomy is, why should its exercise imply that a person should have anything at all?

To answer these questions, we must look more closely at autonomous action itself. There have been much discussions of the conditions under which persons act autonomously, and of the bearing of causality and reasons upon an agent's autonomy. At this moment, though, what matters is not an autonomous act's antecedents, but its projected consequences. Before acting, we typically weigh alternative acts whose consequences extend from the present into the intermediate and more distant future. Our deliberations thus encompass both possible initial acts and the various later events we expect them to cause. But if our deliberation itself displays this complexity, then the contents of the resulting choices must be similarly complex. Because we deliberate with an eye to consequences, our autonomous choices must encompass not just our immediate doings, but also the later lines of development to which we expect them to lead. Thus, at least one connection between autonomous acts and their consequences is internal to the notion of autonomous agency itself.

And, given this connection, we can indeed see why any value that attaches to an autonomous act might carry over to that act's consequences. Because at least some of those consequences are part of what an agent chooses, it would be quite arbitrary and inappropriate to say that it is good that the agent perform the act he has chosen, but not good that he enjoy or suffer that act's predictable consequences. Since choices encompass both acts and consequences, any value that attaches to the implementation of choice must belong equally to both.

In light of this, our common sense reason for saying that autonomous agents ought to enjoy or suffer specific consequences, namely, be held responsible for specific consequences of their conduct, is that those consequences, where predictable, have acquired value from the fact that they are part of what the agent has chosen. In that case, what justifies our desert-claim will be the value of the retrospective aspect of autonomous action itself. (For this line of argument, see Sher, 1987: 39-40)

II. Autonomy-based Freedom and the Predicament of Choice.

Let us turn to the issue of autonomy-based freedom and to what extent the exercise of freedom will be allowable in the fabric of contemporary democratic societies. Previously in Chapter 1, we have dealt with the idea of freedom as 'free will' or 'moral freedom'; the freedom we shall deal with here is 'political freedom' as the idea describing or demanding a kind of relation between one

person and others, and more particularly the problems of freedom as a political ideal, as an object which political and social institutions ought to be designed to preserve or achieve.

The doctrine of political freedom is widely understood to be based on the ideas of autonomy and value-pluralism. It is sometimes thought that the argument from autonomy is the specifically liberal argument for freedom, the one argument which is not shared by non-liberals, and which displays the spirit of the liberal approach to politics. Thus it is sometimes assumed that respect for autonomy requires government to avoid pursuing any conception of the good life. Those favouring autonomy urge that the process of justification of political institutions must be acceptable to each citizen, must appeal to considerations that are recognized to be valid by all the members of the society. In particular, the ideal of autonomy is used to support a doctrine of political freedom reflecting anti-perfectionism, the exclusion of ideals from politics. This view, for example, is related to what Ronald Dworkin refers to as the notion of equal concern and respect. A government is required to treat its citizens neutrally, in the sense that it cannot favour the interests of some over others. This idea is used by Dworkin to argue for the existence of various rights. However, my position here is to argue against such views, espousing a perfectionist value of autonomy.

It is rational to think that autonomy has to be valued in order to get the liberal programme of individual persons

off the ground. However, the belief that an autonomous life is more worthwhile than other forms of existence can be better justified if the autonomy is utilized to promote human excellence in its relevant field of exercise. I am not alone in vindicating this view. For example, Vinit Haksar claims that an appeal to the value of autonomy involves an appeal to perfectionist considerations. (Haksar, 1979: 189) We may argue in line with Haksar that, even when a liberal society is set up, we would still need to appeal to perfectionist considerations in order to operate it, for instance, in order to decide which forms of life to encourage among the young or in order to show why some exercise of liberties is more important than others. How can we substantiate these arguments?

If we try to bring up a child so that he becomes an autonomous agent, we shall in a sense be influencing him; we shall be helping to make him a different sort of person from what he would be if he were not an autonomous agent. The view that autonomy is among the constituents of a person's good is a kind of perfectionism. A person who has been conditioned in the Brave New World may also have freedom in the sense of capacity to fulfil his wants and aims, though he will not have the freedom to choose between alternative ways of life. Indeed if he has been suitably conditioned (so that he does not aim too high) he may also find it much easier to satisfy his wants and aims than the autonomous agent who may be pursuing aims that are difficult to attain. Thus a view that some forms of life should get lower status than others is not quite as

outrageous and eccentric as it may appear at first. This view can be sustainable with evidences which we can recognize in liberal democracies. For instance, even when there is equality between all religions, the equality does not automatically extend to all groups that claim to be religious. Let us take a case as an example: in the United States there are groups that go in for drugs such as LSD as a means of attaining Spiritual Salvation, yet such groups are not automatically given all the legal privileges and rights that are extended to all recognized religious groups. (See *ibid.* 188 and 297)

If we examine more closely the ideal of autonomy which bears on our ordinary course of action, we will find that autonomy functions as not only a political ideal, but also a social and moral one. (See Gerald Dworkin, 1988: 10-2)

As to a social aspect of autonomous action, let us consider the following problem. We have a set of issues concerning the ways in which the nonpolitical institutions of a society affect the values, attitudes, and beliefs of the members of the society. Our dispositions, attitudes, values, wants are affected by the economic institutions, by the mass media, by the force of public opinion, by social class, and so forth. To a large extent these institutions are not chosen by our free and autonomous determination; we simply find ourselves faced with them.

Many social theorists have worried about how individuals can develop their own conception of the good life in the face of such factors, and how we can distinguish between legitimate and illegitimate ways of influencing the minds

of the members of society. While Marxists have been most vocal in raising the issues of 'false consciousness', and 'true versus false needs', it is important to see that the question is one which we must tackle carefully to maintain a healthy democratic society. For it is a reasonable feature of any good society that it is self-sustaining in the sense that people who grow up in such a society will acquire a respect for and commitment to the principles which justify and regulate its existence.

And then, what is the moral implication of autonomy? Conceptions of autonomy are also used to argue for the illegitimacy of obedience to authority. The emphasis in this argument is on the individual making up his own mind about the merits of legal restrictions. This use of autonomy seems much closer in content to the ideal of moral autonomy. Then, what is the ideal of moral autonomy? As a moral notion which is forcefully vindicated by Kant and shared by many philosophers, the argument is about the necessity or desirability of individuals choosing or willing or accepting their own moral code. According to this idea, we are all responsible for developing and criticizing our moral principles, and individual conscience should take precedence over authority and tradition.

The upshot of above discussions is that in those three areas of autonomy - political, social, and moral, we find that there is a notion of the self which is to be respected, left unmanipulated, and which is, in certain ways, independent and self-determining. But here, we also find certain tensions and paradoxes. If the notion of

self-determination is given a very strong definition - the unencumbered self, the unchosen chooser - then it seems as if autonomy is impossible. We know that all individuals have a history. They develop socially and psychologically in a given environment with a set of biological endowments. They mature slowly and are, therefore, heavily influenced by parents, peers, and culture. How, then, can we talk of self-determination?

Again, there seems to be a conflict between the aforementioned notion of self-determination and other important notions of correctness and objectivity. If we are to make reasonable choices, then we must be governed by canons of reasoning, norms of conduct, standards of excellence that are not themselves the products of our own self-tutored choices. We have acquired them at least partly as the result of others' advice, example, teaching - or, perhaps, by some innate coding. In any case, we cannot have determined these for ourselves. Here our formidable question is how and to what extent we can allow people to enjoy independent autonomy and freedom as respected persons while not ignoring the factual predicament of choice which has been forged and defined by customary practices and community values. I shall tackle this problem by proposing an analysis of personal identity in contemporary societies and, based upon that, by combining two kinds of the indispensable human good for becoming a perfect citizen, namely, individual liberty and communitarian virtue.

III. Liberal-Communitarian Value.

It has become a commonplace that most contemporary liberal theory is 'deontological', that is, gives priority to the right over the good, in contrast to utilitarian, or communitarian, or perfectionist theory, which is 'teleological', that is, gives priority to the good over the right. Like so much else in the current vocabulary of political discourse, this distinction was made prominent by Rawls's Theory of Justice. Rawls argues that it is a great virtue of his theory that it gives priority to the right over the good. Critics, however, have argued that this is liberalism's foundational flaw. The criticism is found not just among the old-style utilitarians Rawls was chiefly arguing against, but also among socialists and conservatives, communitarians and feminists. The desire to give priority to the right over the good is said to reflect unattractive or even incoherent assumptions about human interests and human community. The question of whether the right or the good is prior is now seen as a central dividing point for contemporary political theories.

My task here is an eclectic one: while taking a view that the good is prior to right as a foundational point, I shall try to narrow the gaps between two onesided arguments by clarifying the differences of view on personal identity and social conditions under which we live.

Let us first examine the communitarian attacks against liberal theories. There are perhaps almost as many communitarian positions as there are communitarian writers. Nevertheless, some common threads run through most of the important communitarian works. The fundamental

communitarian criticisms seem to be these:

(See Buchanan, 1989: 852-3)

(i) Liberalism devalues, neglects, and undermines community, and community is a fundamental and irreplaceable ingredient in the good life for human beings.

(ii) Liberalism undervalues political life - viewing political association as a merely instrumental good, it is blind to the fundamental importance of full participation in political community for the good life for human beings.

(iii) Liberalism fails to provide, or is incompatible with, an adequate account of the importance of certain types of obligations and commitments - those that are not chosen or explicitly undertaken through contracting or promising - such as familial obligations and obligations to support one's community or country.

(iv) Liberalism presupposes a defective conception of the self, failing to recognize that self is 'embedded' in and partly constituted by communal commitments and values which are not objects of choice.

(v) Liberalism wrongly exalts justice as being 'the first virtue of social institutions', failing to see that, at best, justice is a remedial virtue, needed only in circumstances in which the higher virtue of community has broken down.

Once we attempt to interpret these rather abstract and complex pronouncements and delineate connections among them, the task of reconstruction will form shape. It will be easier if we simplify the main points of communitarian critique against the liberal political thesis,

distinguishing the gist of the communitarian points into two different versions. The first is the radical communitarian view that rejects individual civil and political rights out of hand and seeks to replace references to individual rights either with teleological talk about the goods of communities or with talk about group rights. The moderate communitarian, by contrast, acknowledges individual civil and political rights but denies that they have the sort of priority the liberal attributes to them. This latter claim does, however, depend upon how strongly the liberal's priority thesis is stated. For Rawls the priority appears to be as strong as possible since he accords the basic liberties lexical priority.

The liberal political thesis which communitarians with different versions concurrently attack is the thesis that the proper role of the state is to protect basic individual liberties, not to make its citizens virtuous or to impose upon them any particular or substantive conception of the good life. This thesis is the principle of neutrality. Thus with this, if the state enforces the basic civil and political rights it will leave individuals free, within broad limits, to pursue their own conceptions of the good and will preclude itself from imposing upon them any one particular conception of the good or of virtue. Neutrality is justified because it is the practical expression of priority of freedom over the good.

However, there can be another version of the liberal political thesis which we may call perfectionistic liberalism. By this thesis we can argue for the worth of

the life characterized by distinctively liberal virtues and goals. This view asserts the worth of a life of self-mastery, self-expression, active pursuit of knowledge, unhesitating acceptance of moral responsibility. The liberal state is justified, according to this view, because it is designed to foster liberal virtues, to allow the maximum scope for their exercise. This view has been defended, for example, by Brian Barry who insists that "a liberal must take his stand on the proposition that some ways of life, some types of character are more admirable than others... He must hold that societies ought to be organized in such a way as to produce the largest possible proportion of people with an admirable type of character and the best possible chance to act in accordance with it..." (Barry, 1973: 126)

Here my strategy for espousing a thesis of liberal-communitarian value is to explore the possibility whether we can accommodate the communitarian core virtue of caring as an objective value within the realm of perfectionistic liberal value. But before doing this, let us examine more closely the communitarian critique of liberalism and the contents of its validity and deficiencies.

First, we may begin with the radical communitarian complaint that liberalism devalues, neglects, and undermines community. To assess its force we must do two things: first fix on a preliminary idea of what community is, and then understand the nature of the thesis that community is a fundamental human good and the implication of this thesis for the liberal political thesis.

Communitarians emphasize that a genuine community is not a mere association of individuals. Members of a community have common ends, not merely congruent private interests, and these are conceived of and valued as common ends by the members. If I am a member of a community I share goals and values with other members. I and they conceive of these as our goals, not just as goals which we each have as individuals and that happen to be the same for all of us. By contrast, in a mere association, individuals conceive of their interests as independent and potentially opposed. Their relationships with one another are viewed not as in themselves constituting the good of their endeavours but as the means toward private goods independently identified.

As Buchanan argues, the claim that community is a fundamental good for human beings may be understood in two ways: either as a descriptive psychological generalization that human beings strongly desire community, or at least find it deeply satisfying or fulfilling when they achieve it; or as a normative claim that community is an important objective good for human beings. Then, the former must be supported by empirical data while the latter requires a philosophical theory of the good - a theory of objective value. (See Buchanan, 1989: 857)

Can we then explain the human desire for communal relationship with any psychological theory? According to Erich Fromm, a social psychologist, there are two kinds of basic needs which are indispensable parts of human nature and imperatively need satisfaction, namely, physiologically conditioned needs and psychologically conditioned needs.

The former needs are rooted in the physiological organization of man, like hunger, thirst, the need for sleep, and so on. For each of those needs there exists a certain threshold beyond which lack of satisfaction is unbearable for self-preservation. Likewise the psychologically conditioned need is equally an imperative part of human nature. This need is not rooted in bodily processes but in the very essence of the human mode and practice of life: the need to be related to the world outside oneself, the need to avoid aloneness, to have a feeling of communion and belonging. (See Fromm, 1942: 13-5)

As to a normative claim that community is an objective social value for human beings, we can deduce the premise from the fundamental nature and factual conditions of human beings.

After all, the radical communitarian attack against the liberal political thesis is that the latter rests upon a distorted psychology or a distorted normative theory that fails to recognize the good of community. The distortion, allegedly, is that the underlying psychology and normative theory are excessively individualistic. Thus what we require, if we are, to respond to this radical communitarian complaint is to advance a non-hyper-individualistic justification for the individual civil and political rights that are thought to be distinctive of liberalism.

My view of liberal individual rights is that they should not be seen as set in invariable opposition to community values, but can provide valuable protections for the

flourishing of community. My hypothesis is that radical communitarians have been blind to the value that individual rights contribute to community because they have wrongly assumed that the primary if not the only justification for them rests exclusively upon an ideal of individual autonomy or of individual well-being in which participation and sharing in community is not conceived of as being an important ingredient in the individual's good.

Then how do the liberal individual rights protect community? Although we are acknowledged that community is an important human good and participation in political community is an essential ingredient in the good life for all humans, the radical communitarian vindication for an all-inclusive communal participation seems untenable. Given the apparent diversity of the conditions of human flourishing, the pronouncement that the best life for all, or even most, humans requires participation in the most inclusive form of political organization is sheer dogmatism in the absence of a well-defended, highly particularistic, and absolutist theory of objective good. It would be a mistake, of course, to argue that the liberal political thesis is superior by virtue of being value-neutral or value-subjectivism based on skepticism - neither of which it need involve.

Then again how can the liberal individual rights be reconciled with community value? We can reply by giving sound practical reasons for employing individual rights, yet without smuggling in objectionably hyper-individualistic assumptions. First, individual rights

to freedom of religion, thought, expression, and association facilitate rational, nonviolent change in existing communities as well as the rational, nonviolent formation of new communities. Secondly, I wish to suggest that liberal society offers the best feasible framework for rendering autonomy and commitment to others compatible. The compatibility is achieved, of course, through compromise. Without the protection for autonomy and independence guaranteed by liberal rights, the individual, absorbed in community, unable to reflect critically upon his role, his obligations, and the character of his community as a whole, may become an unwitting accomplice in an immoral way of life. A moral agent is one whose behavior in some basic sense is his own; and one makes behavior one's own through the exercise of choice, either directly or indirectly. Members of a community will be neither unencumbered, bare selves nor social robots who have abdicated their moral agency (or never been allowed to develop it). For the community itself will be constituted in part by a tradition of ongoing self-criticism.

Here, the important idea is that the notion of desert as the central criterion of justice is most viable in the context of a liberal community; reward and punishment according to individual efforts and contributions are most meaningfully acknowledged in that liberal community whose primary bond is a shared understanding both of the good for man and the good of that community and where individuals identify their primary interests with reference to those goods. (See and compare MacIntyre, 1985, 2nd edition: 250)

I have argued so far that the justificatory basis for the liberal political thesis need not and should not be construed so narrowly. The advocate of the perfectionistic liberal thesis can embrace an expanded psychology and a richer theory of the good and can admit that not only autonomy but also community is of fundamental importance. My analysis suggests that the best justificatory framework for the liberal political thesis has the resources to incorporate much of what is valuable in communitarian thought without abandoning the prominent role for individual rights that is distinctive of liberalism.

CHAPTER 8. TWO-STAGE JUSTIFICATION FOR REWARD AND PUNISHMENT

I. Framework of Justification.

So far I have proposed a two-stage justification for reward and punishment, namely, the first stage on the principle of justice based on desert and the second stage on the principle of the common good. Since justice is not the whole, though it is central and a particularly important element of social morality, a justification of reward and punishment based on justice ('just' reward and punishment, just-making) is not sufficient for a complete justification of those kinds of treatment. The complete justification which should be based on the common good ('appropriate' reward and punishment, good-making) needs an extra consideration of utility in the individual case in addition to the primary test of justice.

In these two different senses of justification, namely, just-making and good-making or just and appropriate, I have argued that we can establish a two-stage justification for reward and punishment. (See Chapter 5, III. and Chapter 6, I.) For establishing the above premise I have employed explicitly or implicitly a number of supporting principles. We may recall those principles as follows:

(i) While there are diverse basic human goods and values of life in society, namely, self-preservation, self-development, happiness and harmony, and practical reasonableness, the ultimate end to which the rational

human pursuit or possession of such goods is directed is self-fulfilment and flourishing. ('The thesis of self-fulfilment') (See Chapter 6, V.)

(ii) In making progress toward self-fulfilment, the human being, though he is in his thought and conduct influenced by his social, psychological, and physiological conditions, is by his fundamental nature regarded as possessing and exercising free-will. As to the principle of responsibility of a free and rational moral agent, autonomous action, personal choice, and one's desert on account of one's acts and choices will be a proper basis for rendering one's due reward and punishment. ('The thesis of free-will and autonomous action') (See Chapter 1, III. and Chapter 7, I.)

(iii) Any distributive inequality in reward and punishment according to desert is only justified if in regard to the matter of distribution everyone has been given an equal opportunity to participate and exert effort. ('The thesis of equal opportunity for desert') (See Chapter 1, II.3.(2))

(iv) Any distributive inequality in reward according to desert is only justified after each member of society has given an equal satisfaction of basic needs according to the principle of needs. ('The thesis of equal satisfaction of basic needs') (This principle is introduced here for the first time.)

(v) Desert discourse and thus justice discourse are in their nature teleological since invoking or administering justice requires a communication and sharing of a common sense of justice among the members of community or society,

and this development and sharing of a common sense of justice is of value since it creates the conditions for nurturing the other human virtues in society. ('The thesis of desert and justice discourse as teleological communication') (See Chapter 1, II.2 and Chapter 5. III.)

(vi) Since human nature and the idea of justice are essentially teleological, the concept of justice as a static equilibrium, or as formal reciprocity, requires to be transformed into a dynamic equilibrium, equitable reciprocity with due regard for the common good where the seemingly conflicting ideas of liberty, equality, and solidarity are fully intertwined and harmonized as a state of social homeostasis. ('The thesis of dynamic equilibrium and harmony') (See Chapter 6, II. and V.4)

(vii) Where rewards or punishments are apportioned by public institutions, the proper criterion for a person's reward or punishment is not abstract moral desert but 'institutional desert', determined according to whether or not the person succeeds or fails in fulfilling the requirements of institutional rules or laws which have themselves to be justified by their tendency to secure abstract desert and the common good. ('The thesis of institutional natural law') (See Chapter 6, II. and V.4)

These schematic principles of justice and the common good look rather abstract and simplified while real situations for human life are so complex that they cannot be plotted on to a simple and straightforward framework. However, I believe my framework and principles of justification are plausible as a basis for better understanding of and better

solutions to concrete problems. Thus, to substantiate my theses, I need to give a fuller exposition of each principle with supporting arguments, where possible testing the principle for its applicability to real or hypothetical problem cases.

II. Seven Theses.

II.1. The thesis of self-fulfilment.

We may first consider the general question about the reason why we should live, or more correctly, live a life in society at all. The most plausible answers to this question seem to connect with various kinds of teleological theories, namely, egoistic hedonism, utilitarianism, or a perfectionistic theory of self-fulfilment. Men should live in society because of the obvious advantages derived therefrom. Without society men cannot survive, since society alone makes possible the division of labour and exchange of commodities which are necessary for the satisfaction of men's material needs. Many philosophers also stress that other kinds of goods besides biological and economic ones are made possible only by social relations, including those of human association itself: men value one another's company and friendship quite apart from any economic benefits they may derive therefrom. Other philosophers add that the cultivation of the moral and intellectual virtues is possible only through society.

Although the initial emphasis of each of these arguments is seen from egoistic viewpoints, referring to the good of

each individual separately, they also become, by extension, utilitarian arguments referring to the greatest general happiness. That is, more total good is achieved if men live in society than if they do not.

The self-fulfilment theory which I have defended so far is not opposed to the idea of pleasure or happiness, but it does not regard pleasure as the specific end of human action, or as the one quality which makes right acts right. As we have discussed, when a human being aims at and strives to achieve specifically human goals, then there can be deeper satisfaction in achievement. For example, to a violinist who is playing for a much-acclaimed orchestra, a sculptor, a carpenter, or any teacher, and in general to all human beings who have a function or activity, the good would be thought to reside in performing that function well, while pleasure or satisfaction is a by-product of such good functioning, not the end or aim.

A self-fulfilment theory is much more clearly teleological than utilitarianism in being concerned with the goals persons intend to achieve by their actions and not with consequences as such. Ends and consequences are not identical, for, although ends may be looked upon as intended consequences, consequences need not be intended. It is also true that persons do not always succeed in producing the consequences they intend. So there seems to be a real difference in judging actions according to ends or intentions, on the one hand, and in judging them according to consequences, on the other.

Many of the consequences of actions are accidental or

unintended. A policeman chasing a bank-robber fires a gun to stop him, but by mistake accidentally wounds a nearby innocent pedestrian. Sometimes, when a doctor intends to cure his patients' disease quickly by giving them a high-unit antibiotic, he happens to harm them instead. Thus the difference between a perfectionist and a utilitarian is that the perfectionist focuses on the intention as the factor that determines the morality of the act, and the utilitarian focuses on the consequences. Intentions also tend to be determinate or specific, whereas consequences are indeterminate. Persons usually know what they intend to accomplish by their actions, but they cannot always know what the consequences of their actions will be.

However, goals and consequences are related in a number of ways. Goals may be spoken of as intended consequences. We also judge the success or failure of an intention by looking to see what is actually done. But sometimes we distinguish the goodness or badness of an act based on a consideration of its consequences from the goodness or badness of the agent who performs that act based on his or her intentions. That is, we may say that someone is a good person, for intending to do well, even though that person brings about bad things - by failing to do what is intended.

Thus, in such a context we may argue that the agent's culpability depend crucially on whether he intended to do evil, or rather foresaw evil as a side-effect of his action: this is because, for instance, while it is always wrong to intend the death of an innocent, we may sometimes

justifiably do what we know will cause the death of an innocent as a side-effect.

Let us consider a situation where a person is confronted by a voluntary or involuntary threat from somebody to his or her own life or safety. Any one so confronted is morally justified to repel the threat, to stop it in its tracks, by means sufficient (but not more than sufficient: here is the case of a genuine use of 'proportionality') to stop it even if those means will as a matter of fact cause the death of the attacker whose act (however involuntary) is itself the threat. This act of self-defence on the part of the defender is an act with a double effect; one effect is the stopping of the life-threatening act, the other is the bringing about of the death of the attacker. For the one engaged in justified self-defence, the latter effect is a side-effect and so can be unintended; and where death is an unintended and unwanted result of an act which is otherwise justifiable, there is no direct killing and no choice directly against the basic good of life. (See Finnis, 1983: 132)

The self-fulfilment theory may be criticized because of the demands it makes upon individuals, because its standard is human excellence. We hear much talk today about the need to avoid stress and how we can make ourselves feel good by lowering our expectations or reducing our goals. We are sometimes told to be non-judgmental, to be forgiving of our faults. Although such advice may help us avoid excess, it tends to miss the point, so central to self-fulfilment theory, that there can be deep satisfaction in achievement.

There is satisfaction to be found in the struggle to achieve a goal, as well as in the accomplishment of it - as a student, a parent, or in a profession or even a hobby.

II.2. The thesis of free-will and autonomous action.

(1) Free Will.

The idea that personality has some kind of essence, struggling for self-realization or free expression - that positive freedom consists in actualizing this ideal self - is a recurrent theme in moral and social philosophy. A person as a free and rational agent is thought of as a responsible and potentially progressive being moving toward self-fulfilment, yet the degree of, and means of achieving that goal may vary according to one's actual individual character and choice of instrumental value.

We have suggested, in defining the justifying and extenuating conditions of punishment, that both blame and punishment presuppose acts stemming from the deliberate intention of a free and responsible agent. (See Chapter 5, III.) Consequently, a case for either could be rebutted by showing that a man was not responsible for his actions. If, for instance, he had been compelled to act with a pistol at his back, or if he were insane and subject to uncontrollable impulses, we should say he could not help doing what he did - that he was not a free agent - and therefore not culpable (or not eligible for reward).

Some people, however, claim that there is a sense in which none of us is free. Everyone, they would say, is formed by his past and by his environment. What he is and

what he does can be accounted for by complex causes that go back to childhood and even beyond. Free-will is thus an illusion; the choices made by normal men are as much determined as those of lunatics. We are all prisoners of our past.

This view has been widely held to be destructive of morality. For if we are not free to choose between right and wrong, what point could there be in saying we ought to choose the right, and blaming anyone for choosing the wrong? Similarly, it has often been thought to undermine the moral basis of punishment. For since we have allowed that no one ought to be punished who is not responsible for his actions, would it not seem to follow that if no one is responsible, punishment must be given up altogether, and replaced by remedial treatment? If an assassin cannot help the murder he commits any more than the dagger cannot help stabbing the victim, what point is there in concepts like guilt, responsibility, and punishment?

As we have observed, questions of free-will usually arise when being free is contrasted with being determined; for it is thought that if there is determinism in human affairs, then we cannot be really free. Hobbes, for example, who was fascinated by the science of mechanics, suggested that human-beings, like watches, were part of a mechanical system of nature, and that all their actions were determined, as those of a clock are determined by its spring. (See Hobbes, 1904: Introduction, xviii.) Hobbes viewed that human relation or social organization is the product of the interactions of mechanically determined individuals and

innate competitive and aggressive drives.

Other significant strands of determinism were later added by Marx who stressed the economic determinants of social action, and by Freud, who stressed the unconscious psychological determinants of individual behaviour laid down in early childhood. Let us see their theories briefly.

Marx, having been influenced from Hegel's historical determinism and Darwin's notion of natural selection, developed his own theory of economic determinism. He believed that our characters and actions are not as much historically determined as they are economically and socially determined. Marx's theory, called dialectical materialism, states that human beings are determined by an evolutionary economic class struggle. He believed that there is an inevitable economic force in nature which human beings cannot control and which will eventually lead to the ultimate goal, a classless society. However, some immediate attacks on this theory are as follows: although there is no doubt that people are influenced by their individual economic status and that of their society, there are many other influences which affect economics as well as human beings. For example, scientific and technological developments have a great deal of influence on the economic status of societies and their members - perhaps more than that economics itself has on science and technology. Furthermore, human beings affect or determine the changes in economics at least to the extent that economics affects them, as can be seen in the current development of economic reform in Soviet Union.

Freud put forth the theory that human beings are determined, even prior to birth in the womb, by their unconscious minds and by various natural drives which their society's mores and customs require them to repress. For example, one of Freud's theories is that all sons are basically in love with their mother (Oedipus complex) and all daughters are basically in love with their fathers (Electra complex). Because incest is forbidden in most societies, these unconscious yet natural drives must be repressed, causing human beings to be affected in different ways. Therefore, if mothers or fathers give too much, too little, or the wrong kind of love to their sons or daughters, the entire mental and emotional lives of the children can be affected to the point where they become neurotic or psychotic. Here, the most striking and controversial aspect of Freud's view of human nature is his emphasis on sexuality, whether repressed or not, as a motive for human action. Though there are a great deal of deeper and more subtle theories developed and maintained by Freud which I cannot deal with here adequately and this matter is beyond my purpose, one major criticism of his theories is that they are too generalized to have any real and conclusive basis in fact.

However, such theories have given rise to a widespread conviction that human decision is impotent in determining what human beings do. Men were pictured as puppets at the mercy of forces which they could not understand nor control. But here, an important question to be raised is that: is this postulated antithesis between being free and

being determined really legitimate? What do we mean when we say that our behaviour is determined? And if our behaviour is determined, does this mean that it cannot also be free?

Problems connected with freedom and determinism are best clarified by examining what we wish to convey when we say that an action is 'determined'. For there are two different things, which are often confused, which 'determined' can mean. Firstly, there is what we might call 'causal explicability' and, secondly, 'unavoidability'. Many people have failed to distinguish these two very different strands in the meaning of the term 'determined', and they have often thought that 'determined' involves both of these things. When we say that our behaviour is determined, therefore, it is often assumed both that our behaviour has causes and that it is unavoidable. But my position here is that simply because our behaviour has causes it does not necessarily follow that it is unavoidable. There is in general no necessary connection between the two senses of 'determined'. Events whose causes are known are not necessarily also unavoidable. Indeed, very often, knowing a cause of something is a necessary condition of being able to avoid it. If we know that late nights cause irritability at breakfast, we know what to do to avoid irritability at breakfast. Thus 'free' and 'responsible' are only used appropriately as contrasts to 'determined' if by 'determined' we mean 'having causes of the compelling sort'. (For this point, see Benn and Peters, 1959: 198-9)

In sum, since we know that physical events can cause thoughts and feelings, there is no reason to suppose that

the opposite cannot happen. The ideas of moral responsibility, moral guilt, and remorse all presuppose that a deliberate act is freely chosen and could have been avoided. A charge of moral culpability can be rebutted with the claim that one could not help doing what one did. If the action could not have been avoided, then one is not culpable. Along with these ideas go those of desert and just punishment. Punishment involves voluntary choice and responsibility. Let us examine in more detail the idea of autonomous action or voluntary choice.

(2) Autonomous Action.

As a complete set of criteria of justice, I shall propose three in this thesis: moral desert, institutional desert or entitlement, and basic needs. Among these three, the claim based on moral desert is the most important and ultimate criterion of justice since only the idea of moral desert can squarely reflect the value of an autonomous action and the responsibility of human beings as moral agents. Why is it worthwhile living in a human society? Is it because we can earn food, clothing, and shelter in a more secure way than in any other form of living and thus enjoy well-being by satisfying our wants and desires? Or is it because we can live a meaningful life in a society by allowing everybody to fulfil his or her ideal through exercising his or her own autonomous choice and effort? It is now widely perceived as an uncontested idea that every human being should be given an equal worth and dignity when we recognize each other as moral persons. Then, in order to truly treat a person as a responsible being, as a master of

his or her life and fate, giving a due reward and punishment to his or her own choices and works will be considered to be essentially a fair and proper way of treating each with the respect due to a moral agent.

Let us take a case which can explain why voluntary action of one's own choice is important in the apportionment of rewards and punishments. Imagine that a group of students go on a sea-sailing exploration and are stranded on a desert island, with limited resources. They have some loaves of bread to distribute. Everyone is given one loaf of bread. Everyone eats his loaf except three people. The first of them has a mouldy loaf. The second gets a normal loaf but, to his personal interest, voluntarily decides to go angling to the seaside with his loaf using it as a bait, hoping that it will not be snatched off by a fish before he succeeds in catching it, but knowing that there is a risk of its happening so. The loaf of bread is snatched away by a fish from his fishing rod. The third one is like the second, except that the person's reckless venture is a result of a disease.

If the group of students have only two loaves of bread after the initial distribution, then they should give a loaf each to the first and third person rather than to the second. The rationale for this decision may be a retributive idea that the second person cannot complain of his suffering of hunger due to his reckless risk-taking. It would have been better if he had been able to eat a loaf or a fish even though he ventured into a risk-taking angling. But he deserves less sympathy than the other two. The loss

that he undergoes should be discounted to some extent. Not that he wanted the loss, but he knowingly and recklessly took a risk, so in a sense he voluntarily brought the loss on himself. But I do not mean that every kind of voluntary risk-taking and subsequent probable loss should always be discounted. If a mountaineer in a rescue team hurts himself during a rescue operation, he brings the loss on himself. Yet such a loss is not discounted; we do not give it a lower priority in the allocation of medical resources. The relevant rationale here is that we discount a loss when the risk-taking business is oriented merely for an individual interest and benefit rather than for a socially useful purpose and there is a method of avoiding the loss that the agent could reasonably have been expected to use.

This general rationale also applies to punishment. Infliction of punishment may be viewed as an evil, but it would be less of an evil when the person brings it on himself. The voluntary wrongdoer has by his own free choice and recklessness exposed himself to a liability to punishment. We are less impressed with his loss when he could and should have avoided it. So, other things being equal, we are more ready to punish the voluntary criminal than the involuntary one. One might believe in this general rationale for rendering rewards and punishments because it strikes one as intrinsically fair. This account is a basic justifying reason for retributivism which holds that a just punishment should depend on desert: punishment is justified only if it is deserved for a voluntary offence, and the severity of the punishment should be proportionate to the

seriousness of the offence.

II.3. The thesis of equal opportunity for desert.

If we are ordinary, healthy, law-abiding members of society, we are supposed to be engaged in some valuable work in our own work-place as part of our pursuit of a meaningful life. As a poet, carpenter, teacher, driver, politician or whatever kind of a worker, we are engaged in producing artefacts or goods, or rendering services, and as a return for such work, we receive valuable goods or services to maintain and sustain our life. That is a somewhat idealized but essentially factual picture of our ordinary social life. And, as we have observed in our previous discussion, humans as free and autonomous agents are all pursuing their diverse ways of life according to available opportunities and their own abilities and preferences as to job or position, in order to fulfil their own purposes in plans of life.

If we endeavour to participate in valuable contributions to society and expect a fair return for our contributions, how can we secure a just opportunity to participate in that work for a fair return? The maxim of justice, 'to give to each one's due', requires us to ask what one's due is and how we can decide to give one his or her due. Since in the 'circumstances of justice' we find it necessary to compare and distinguish each person from others to give each his or her own due, we should look after all at the qualities or attributes of each person. This discernment of personal characteristics for the sake of justice is not an easy

task. However, the relevant criteria of just distribution should be three, namely, moral desert, institutional desert (entitlement), and basic needs. If these criteria would be considered to be acceptable, the ensuing question to be answered will be how, or in what manner, we can assess and rank, if feasible, the relative value of each person's moral or institutional desert, or basic needs. Furthermore, if there arises a conflict among those three seemingly competing criteria, how can we solve the problem of priority-setting among those three?

Suppose, for example, an old man who has established a substantial amount of wealth after a long life of hard work is going to die. He has several children, one of whom is blind, another a playboy with expensive tastes, a third a prospective politician with expensive ambitions, another a poet with humble needs, another a sculptor who works in expensive material, and so forth. He wants to be called a fair father and contemplates a just and equitable way of distribution. How shall he draw his will? For all the differences in characteristics of each child, he loves his children 'equally' and wishes every child well-being and flourishing. Now he wants to know how he can treat his children justly or fairly and whether just treatment is identical with equal treatment. Then, the question is what equal treatment is. Is it equality of resources, or equality of welfare, or equality of opportunity? With these questions I shall begin discussions.

Our assumption here is that in any kind of society, whether in family, company, or the state, there is a moral

or legal obligation to distribute social wealth and resources justly to the members of society. Our main question then concerns the justifying grounds of any particular mode of distribution. My approach to this question is twofold: Firstly, under the general principle of equality, an initial appeal is to a presumption of equal distribution of society's benefits and burdens among members.; Secondly, if the initial presumption of equal distribution is found inappropriate, then, (i) as to the matter of desert, "from each according to his autonomous choice, to each according to his desert". (ii) as to the matter of basic needs, "from each according to his means, to each according to his needs." So let us begin with those.

(1) The Right to Equality.

As a formal way of treating people justly, we should start from the principle of equality which is derived from the fundamental premise of natural rights of man, namely, that "all human beings are created free and equal in dignity and rights." However, the principle of equality, like justice itself, is another controversial notion; no simple definition of equality has been made. Certainly, equality would cause trouble if it does mean that everybody is or should be the same: humans are unequal in capacities, whether of physical strength or of brain, as they are in beauty. The statement that "all men are equal" (or "all men are born equal") should be meant primarily, not as a statement of fact, but as a statement of right: all men

have a right to equal treatment.

However, this right to equal treatment is only one source of justice since another fundamental human right to freedom requires a different, modified mode of treatment. Freedom and the corollary of its exercise require us to accept unequal treatment as can be seen in cases of giving varied rewards to each person according to his or her desert. Thus a right to equal treatment is only a presumptive one for justice, applying only except and until when relevant differentiating criteria between persons are established. Then we can say that the principle of just treatment presumably requires a right to equal treatment. If put in a different formulation, it is to say, 'treat like cases alike' or 'treat equals equally', 'treat unequals unequally'.

To what do all men have an equal right? We may first consider that everyone has a right to equal consideration. If I show greater concern and give a favour to a handicapped child, I may require a justifying account that a handicapped child needs greater welfare support to maintain even a minimally satisfactory life as a human being. Otherwise I may face a complaint from other children that they are ignored and thus treated discriminatorily. Here, the right to equal treatment is initially a right to equal consideration; and unless there are relevant differentiating grounds, it requires giving the same non-discriminatory treatment to the various people who are affected by my decision. Then what about those relevant differentiating grounds and circumstances? I suggest two

relevant grounds: firstly, there is a right to equal opportunity; and secondly, there is a right to the equal satisfaction of basic needs.

(2) Equal Opportunity.

As a preliminary to the justification of equal opportunity, we require some clarification of the concept of opportunity. An opportunity may be said to occur when an agent is in a situation in which he may choose whether or not to perform some effortful act which is considered to be desirable in itself or is a means to the attainment of some goal which is considered to be desirable. An opportunity is thus a type of liberty or freedom for it involves the absence of prohibitions or obstacles limiting what agents may do or acquire. The question now is whether a society or the state is obligated to create equality of opportunities in the senses just defined. We may imagine at least two ways in which equality of opportunities can be defended. Those would be: (i) the notion of desert; (ii) the principle of efficiency.

The first and most important justification of equality of opportunity focuses on the notion of desert. For each social role or position, it is argued, a certain range of personal qualities may be considered relevant. Here, the essential element of relevant personal qualities is individual's valuable effort. When we evaluate a person's qualities, the most important element to be taken into account of human value is, after differences of natural endowment and social background of each person are

considered, the distinctive characteristics of each person enabling him to exert voluntarily and intentionally worthy effort resulting in some valuable social contributions. Individuals who have demonstrated and now possess these qualities to an outstanding degree deserve that role or position. A fair competition guided by equality of opportunity will allow exemplary individuals to be identified and rewarded.

Many critics have objected to this line of reasoning. It is a mistake, they argue, to regard social positions as prizes. In athletic competition, the first prize goes to the one who has performed best. Here, it would be inappropriate to take future performance into account or to regard present performance in the context of future possibilities. The award of the prize looks only backward to what has already happened. The prize winner has established desert through completed performance. In the case of social positions, on the other hand, the past is of interest primarily as an index of future performance. The alleged criterion of desert is thus reducible to considerations of efficiency.

This critique contains elements of truth, but I believe that the sharp contrast it suggests is overdrawn. After all, societies do not just declare the existence of certain tasks to be performed. They also make known, at least in general terms, the kinds of qualities and abilities that will count as qualifications to perform these tasks. Relying on this shared public understanding, young people strive to acquire and display these qualities and

abilities. If they succeed in doing so, they have earned the right to occupy the corresponding positions. They deserve them. It would therefore be wrong to breach these legitimate expectations. It would be wrong if we say, "Sorry. We cannot grant you a license to practice law even though you have studied legal subjects many years, passed a bar examination, and now have an appropriate quality to be a lawyer.", just as it would be wrong to refuse to give a prize to the victorious runner who crossed the finishing line first.

In short, no clear line can be drawn between tasks and prizes. Many jobs, which are regarded as opportunities to perform activities that are intrinsically or socially valuable, contain the characteristics of prizes. These jobs as kinds of prizes carry special double characters - not only backward-looking but also forward-looking rather than complete in single backward-looking - and this gives rise to legitimate disagreement about the criteria that should govern their distribution. There is no science that permits completely reliable inferences from past to future performance in any occupation. But once criteria, however flawed, have been laid down, they create a context within which claims of desert can be established and must be honoured if possible.

To sum up, if the criteria for awarding positions are based on qualifications for performing productively in them, then individuals who succeed in satisfying the criteria deserve the positions; but only if opportunities for acquiring qualifications have been equal in the

relevant sense. Otherwise, qualifications are less a measure of effort and achievement than of initial social and economic advantages. Thus, equal opportunity is viewed here as a necessary condition for individuals coming to deserve the positions they occupy.

As a corollary of the institutionalization of desert, members of society have a broader range of chances of personal development and ensuing self-satisfaction. Since individuals are encouraged to believe that their life-chances will be significantly related to their accomplishments, they will be moved to develop some portion of their innate capacities. Thus, it may be argued, equality of opportunity is the principle of task allocation most conducive to personal development as a crucial element of the human good.

It is also true, however, that more frequently and more obviously equality of opportunity can be justified as a principle of efficiency. Economic efficiency and productivity, with its effect on social utility, seemed to be a good reason to move from equal distributions of goods to unequal distributions with equal opportunities for acquiring the better shares. Efficiency does certainly appear to be served by equalizing opportunities to compete for positions and to achieve them on the basis of competence or productivity. When those who are most competent or productive are placed in the positions they seek, then the productivity of the economic system as a whole should increase. It is surely inefficient to limit the development of the talents of those in the lower

economic strata, or to bar people who are competent from positions on economically irrelevant grounds such as race, sex, religious background.

Efficiency, when focused on developed competence and aptitude, can be correlated with the justifying grounds of desert, but because of its main concern of maximum consequential effect, it will in most cases diverge from the notion of desert. The utilitarians' claim that equality of opportunity can be better justified as a principle of efficiency is refutable. This is because efficiency will not be an ultimate criterion of justification for equality of opportunity. Furthermore, their argument that economic efficiency stemmed from equality of opportunity can be equated with social utility is doubtful. We will see some problems of the mismatch if we follow their utilitarian logic faithfully here. (For this point, see Goldman, 1987: 94)

Consider an example in which only two teachers work at school with two tasks, teaching English and mathematics. Suppose that teacher A can teach both subjects better than teacher B and is by an absolute measure better in English than in mathematics. Furthermore, suppose that A is only slightly better than B in English but much better in mathematics. (Let us say in numerical degree for comparison: as to A, 10 points in English and 7 points in mathematics; as to B, 9 points in English and 5 points in mathematics.) In this case, it is more efficient and productive for the school as a whole to allocate the English teaching to B and mathematics to A, although A will then not be doing what he

does best. (9 points as in English teaching by B + 7 points as in mathematics teaching by A = 16 points, which is compared with 15 points in reverse case.) As a consequence, efficiency may not go in parallel with aggregate social utility in both senses of maximization of productivity and satisfaction. (Consider a case of A's substantial amount of disutility due to job discontent in the light of his long teaching experience and talent.)

Also, an efficient competition among individuals to fill social roles may not produce aggregate social utility, even if the most talented is chosen to fill each individual role. In actual societies where opportunities are equal, the differential rewards attached to tasks which are justified by efficiency can produce comparable distortions. In these societies, efficiency is usually measured by a higher productivity, or, in monetary terms, by higher wage-earning. If, let us say, lawyers are paid much more than teachers because of their more selective procedure of recruitment and its resultant tendency of monopolization, the talent pool from which lawyers are selected is likely to be better stocked. Teachers will then tend to be mediocre, even if the best are selected from among the candidates who present themselves to be competent teachers. In the long run, this circumstance may well impose aggregate costs on society in the sense of the less appropriate functioning of society as a whole.

In sum, economic growth spurred by more equal opportunity which is justified by efficiency and productivity may have negative effects on aggregate levels of social utility. The

emphasis on equal opportunity to compete on the basis of productivity will increase the competitiveness and acquisitiveness of an already highly competitive and acquisitive society. Both effects may lower levels of contentment while increasing levels of productivity and varieties of consumer goods. As competition becomes more intense, those who lose out, and even those who temporarily gain, might be caused more anxiety and disutility. Here, we find justifying reasons for the state to intervene into the market with an institutional tool of restraining of excessive competition while securing equal opportunity to compete on fair terms. Nowadays fair competition with equal opportunity is widely established in the field of antitrust and trade regulations in many advanced industrialized countries.

(3) Fair Equality of Opportunity.

Though the notion of desert is justified by the principle of equal opportunity, this can be best defended on the basis of fair equality of opportunity rather than formal equality of opportunity. However, question here is whether the idea of fair equality of opportunity is sufficiently clear to be applied in any determinative way? How can we secure fair equality of opportunity between persons with different aptitude or skill, or different financial means? It would seem relatively easier to secure fair equality of opportunity when the contestants for position or job have similar intelligence, skill, or material means because in that case we can simply subject all the participants to a

competition in which each has to satisfy equal requirements. But other cases are not so easy. Consider for example the case of admission to the bar as between persons with high intelligence and good education and persons with low intelligence and poor education? The former would have greater prospects of passing the bar examination and of practising law successfully than the latter. Can the latter ask for a different type of examination - supposedly an easier type, for the sake of fair equality of opportunity? Perhaps, no. But what about related and partly similar circumstances such as, for example, that of law school admission as between two applicants with similar intelligence and aptitude, where one is from a wealthy family background and the other is from a socially deprived underclass group? The former has greater means to maintain law study well than the latter. Can the latter ask for some financial support from the school authority or from the state, to pay academic expenses for the sake of fair equality of opportunity? Perhaps, yes.

To answer those questions better, we need to distinguish between prospect-regarding and means-regarding equality of opportunity. (I borrow these terms from Rae et al, 1981: 65-6) Let us distinguish an end-good X from both the 'prospect' of attaining X, and some 'means' for attaining X. Then two principal forms of equal opportunity are: (i) Prospect-regarding equality of opportunity. Two persons, A and B, have equal opportunities for X if each has the same prospect or probability of attaining X; (ii) Means-regarding equality of opportunity. Two persons, A and

B, have equal opportunities for X if each has the same means or instrument for attaining X.

A lottery is a good example of prospect-regarding equality of opportunity; for here the prospects of success are equal for all since each lottery ticket has the same chance of being drawn. Here is the case in which nothing about the differing efforts or differing abilities of persons affect the result. A boxing match or a university entrance examination is a case concerning means-regarding equality of opportunity, at least, in relation to equalisation of certain means. Equal rules and equipment - equal means - are provided to each contestant in order to reveal unequal effort and ability, resulting in unequal prospects of success. Why is this so? Every boxer must stay within the same kind of ring and eschew the same illegal punches; every subject of university entrance examination requires applicants to answer the same questions. The purpose and effect of these equal means are not equal prospects of success, but legitimate unequal prospects of success since equal means are designed to balance unequal conditions or obstacles in competition in order to demonstrate differing efforts, skills, and potentialities of human development.

Thus, as to the meaning of fair equality of opportunity, our focus will be on means-regarding equality of opportunity. It should be taken that opportunities are equal when equal means - equal rules or equipment - are fully available to the present or prospective participants in a competition. This requires equalizing or balancing of

existing unequal means. However, someone might go further and demand an increase of means for the less talented beyond the share provided through means-regarding equality of opportunity. This policy, if adopted, would be extremely problematic to implement. It would require the state to intervene into ever deeper aspects of human genetic endowment and ensuing developmental situations. We are not ready to accept the resultant great curtailment of freedom which this kind of 'Brave New World' policy will bring about.

John Rawls argues for an egalitarian view that fair equality of opportunity should mean that those with similar abilities and skills and also the same willingness to use them should have the same prospects of success regardless of their initial place in the social system. (See 1971: 73) This egalitarian appeal of equal opportunity is vitally connected to its prospect-regarding form, but its practical implementation is meant to be means-regarding since prospect itself will in most cases be materialized through means. Here, of course, 'means' are to be understood as external conditions of action in two ways: At first, tangible means, such as money, equipment and other various material means; Secondly, intangible means, such as social rules, rules of permission or rules of prohibition. 'Means' in these senses lie outside of the acting subject, in contrast to internal or intrinsic properties of the agent, such as ability, aptitude, willingness, which are also conditions of successful action. A prospect-regarding form of egalitarian policy would demand greater means for the

persons from deprived and underclass groups, beyond those already equalized in reliance on means-regarding equality of opportunity; for the demand for the same prospects of success needs far greater means than a liberal policy of fair equality of means. Here, one immediate problem would be again the restraint of freedom in social activity since the securing of the same prospects of success entails greater state intervention into resource allocation. I have reservations about this kind of prospect-regarding fair equality in all ordinary circumstances. Certainly, in some extraordinary circumstances prospect-regarding policies might be acceptable on the basis of forward-looking considerations of utility. But since my view of justice is essentially based on the notion of desert, this is irrelevant to justice. Thus our idea of fair equality of opportunity is basically in the means-regarding form, demanding equal or equalized means.

Now return to the old man in the aforementioned case. We are prepared to propose desert to him as a criterion of justice. The children's worthiness or deservingness of any share of their father's wealth may be assessed by the degree of valuable effort they have exerted toward personal and social good. Thus in this context no child will be morally fitting to inherit his father's property right without showing equivalence to his father in deservingness of reward; for his father, like any person possessing property, can justify what he possesses only by his labour plus its added value to society. Desert-based justice is an idea to serve the common good by on one hand respecting

personal development and social contribution through meaningful labour voluntarily undertaken and on the other hand disvaluing free-riding and wrongdoing in society. Also this idea of meritorian justice is secured by fair equality of opportunity as the only method of obtaining just results in the competition for limited resources and benefits, for only in this way will the consequent grading of individual persons reflect the moral worth rather than the potential utility of the contestants. But here it is to be remembered that fair equality of opportunity is such that the successful grasping of an opportunity is an indication of desert rather than of fortuitous circumstances such as natural ability and social background. The aim of desert-based justice is to distinguish a person's praiseworthy effort and acquired ability from all those factors which are ultimately outwith the control of the agents. Thus as the individual person can no more take the credit for his natural ability than for his family background, both these factors must be equalized or balanced by unequal means in the provision of equality of opportunity.

Now there would be immediate complaint from the talented and competent members of society about this meritorian version of equality of opportunity. More intelligent and talented children might argue that in order to increase the family fortune more effectively and enhance the family fame more efficiently by productive contribution to society, it is expedient to allocate them more opportunity and resources rather than seemingly less efficient allocation

based on moral worthiness and fair equality of opportunity. In a competitive capitalistic society in which high social utility and high monetary reward are intended to go together, it would not appear to be appropriate to stick to the desert-based justice with fair equality of opportunity in the process of education and selection for scarce and desirable jobs. However, this head-on clash between justice and utility is not an actual implication of my notion of desert-based justice. The notion of 'teleological desert' rather than 'just desert' involves not only past worthy action but also a present state of potentiality. This is because we understand human beings as moral persons as in the middle of continuing development which is in most cases difficult, or rather unsuitable for radical and clear-cut separation between what I have been, what I am and what I have the present potential to become. This understanding of human life and moral person alike as an on-going project allows us to view the evaluation of a person's deservingness of reward and punishment in a broader way.

Let us suppose that handicapped persons in wheelchairs are in many cases viewed by normal people as less worthy human beings because of their apparently restricted opportunities for worthy action and social contribution. But now consider their being shown (on TV, etc.) as participants in the paralympics (paraplegic's Olympics). They demonstrate effortful action and enormous potentiality to overcome their handicaps. And thus 'normal' people cannot but evaluate them differently than heretofore. The

reason why they are apt to think in that way is that those handicapped people show more conspicuously the great human potentiality for development even under handicap.

Furthermore, in my scheme of two-stage justification of reward and punishment for the sake of justice and the common good, the complete justification allows us to take necessity or utility into consideration in addition to justice in individual circumstances. Appropriate reward or punishment is the way of justification which can accomodate both backward-looking and forward-looking evaluation. Let me take an example: Imagine a small middle-class town where due to parents's eager attitude to education several pupils have shown musical talents with various kinds of instruments in a national contest of young musicians, but one pupil has particularly shown enormous potentiality for becoming an excellent violinist. However in this town because of limited funds, parents have to consider what course of action to take: either they should distribute funds equally to all prize-winners in the national contest to help them get into national music school, or they should distribute funds unequally by giving the greatest portion to the most promising pupil in order to send him or her to a renowned foreign music school. If parents consider the justice requirements seriously, they would choose the former way; if they consider not only justice but also utility to the town, they would choose the latter way. Our full justification of the theory of reward will support the latter way of decision.

II.4. The thesis of equal satisfaction of basic needs.

(1) Duty of humanity or duty of justice?

Another criterion of distributive justice, besides desert, which rebuts the initial presumption of equal distribution of resources is the principle of needs. The doctrine, "from each according to his means, to according to his needs", requires radically different ways of burden-bearing and benefit-distribution from the doctrine of desert, "from each according to his autonomous choice, to each according to his desert". Under this doctrine, as to burden-bearing, every member of society is required to bear a burden levied by the state or a public welfare institution, for example, tax or social service payment, according to his or her means; as to benefit-distribution, scarce resources ought to be distributed in proportion to the needs of potential recipients, at least to a certain minimum level of satisfaction. Then, this principle of needs is understood as a criterion of justice for the development of welfare policies. In many welfare states the language of justice has been effectively used in the demands for, or justifications of, improvements in the welfare of needy sections of the population, among them, for example, the elderly, the sick, and the disabled.

However, on a theoretical level, it has not been always clear whether the principle of allocation in accordance with basic needs is to be subsumed under the heading of justice. There have been claims that equal satisfaction of basic needs can be more securely based if we appeal to humanity (or charity, benevolence) instead of to justice.

(For example, see Campbell, 1974: 1) The theorists of these claims have voiced that the duty of humanity - the obligation to work for the relief of suffering of the needy people - is not only distinct from the duty to be just but may properly be regarded as on an equal footing with (or perhaps as overriding) justice in the distribution of benefits and burdens. It is perhaps right to say that if we encounter a strange beggar in a street who looks extremely poor and miserable, we as ordinary citizens with sound moral sense may feel a moral obligation to render help though we may not think it would be right to have a legal obligation to do so. We may have some compunction for our inhumane attitude if we ignore a poor fellow human's predicament. This is due to our common humanity which demands that we avert suffering and promote well-being of ourselves and also in the same degree makes us have sympathy for a fellow human's plight.

We can agree with the theorists who argue that there is a justification of our moral obligation to relieve the needy people of their suffering on the basis of our common humanity (or charity, benevolence). However, I wish to argue here that as a matter of the social morality of welfare policy, we can more correctly explain the civil obligation to render aid to needy people on the basis of justice. I believe that neglecting the satisfaction of basic needs as a general social issue would constitute a social injustice as well as serious inhumanity. Why would it do so? This issue forces us to consider the philosophical basis of welfare policy. My view here is not

focused on a particular situation giving rise to a personal duty to rescue particular needy persons whom we encounter, but rather a general social morality giving rise to a civil duty to take part in assisting the needy section of the population.

At first, the fundamental human worth and dignity which we equally possess gives rise to a justifying claim of all members of society to satisfaction of their basic needs. If there are some members of society who are severely ill, handicapped, or starving and thus unable to put themselves into a basic normal life while all other members of society have some resources above their basic needs and are capable of exercising their effort and ability so as to enjoy meaningful life, then those needy members are properly regarded as standing at an unfairly disadvantaged base line for whatever path of life they want to pursue.

What explanation can be given to this asserted 'unfairly disadvantaged base line'? I do not think it unfair that people enjoy different states of health, wealth or ability if those differences among people are results of their different effortful plans and actions. But this itself is a view which presupposes that people were born equally with at least a minimum degree of health and ability and given a fair equality of opportunity to develop them. Since all those people who are given means or opportunities to develop health and life over a minimum level are expected to manage their health and their life plan with due care and diligence, the resulting differences will usually bear a reasonable relation to what they deserve. However, there

are cases of initial differences. Some people are luckily born with health, ability, or supportive family background while other people happen to be born handicapped, disabled, or in a deprived family background below a minimum level of decent life. The latter group of people are naturally put in a disadvantaged position beyond their control. Some people might be at some later stage of life put in an equally severely deprived, handicapped position owing to causes beyond their control. Those situations of below a minimum level of decent life caused by forces beyond one's control are what I call standing at an 'unfairly disadvantaged base line'. And these unfairly disadvantaged positions are cases which require the state to take supportive measures in order to remove obstacles, or provide necessary conditions, for the needy people to lead at least a minimally worthy life or enter into a desired course of life where social competitions are bound to run. So 'unfairly' disadvantaged positions depend on a doctrine of fair competitive conditions as a prerequisite for applying the desert principle.

If the above argument that the needs of those deprived or handicapped people for basic food, shelter, education or medical treatment give rise to a legitimate claim for their provision is right, then we may call provision of this required state support a duty of justice. If the state obligation to provide needy people with basic social service is regarded as a duty of justice, the correlated civil obligation to provide the state with funds for social service is essential to promote just social order. All

members of society are now expected to bear a burden of contribution according to their means.

However, some advantaged group of people may contend that even though they concede that there is a civil obligation to contribute to welfare policy funds, there would be no positive obligation on their part to contribute greater than an average or a minimum sum. They may argue that since their own property rights are fruits of their own effortful action and valuable venture, their property should not be taken away without a just reason or a just compensation. But if we consider the social circumstances in which we establish achievements and obtain property, we may acknowledge that there are various elements of luck and natural or social contributions beyond our control and desert. While disadvantaged people may have suffered from bad luck or endowment, advantaged people may have enjoyed good luck and thus have been able to accumulate property. What the advantaged people are expected to return to society without bearing an unfair burden is this portion of fortune which they have earned through (undeserved) good luck or with neighbours's contributions. This redistributive scheme aims at mitigating natural handicaps and inequality in endowments toward equal satisfaction of basic needs of all needy people. This scheme is also justifiable if we acknowledge that the lack of social commitment to satisfying basic needs of the least advantaged people would prevent the development of a sense of community, a sense of communal solidarity, and the common good.

So far we have discussed justifying grounds on which a welfare policy of satisfaction of basic needs itself constitutes a matter of justice. But if we consider the ways in which basic needs and desert are associated in social transactions, a more conspicuous picture of the relationships between basic needs and justice emerges. Basic needs may arise because of maltreatment at the hands of others as when injury is inflicted by the intentional action or inaction of another person, or because exploitation has taken place as when one group uses its position of dominant power to reap the benefits of the productive acts of another group. In the case of the deliberate infliction of injury, blame attaches to the injurer and justice requires that compensation be paid to the victim as well as that punishment be meted out to the offender. In the case of exploitation, the redistribution of scarce resources as between the exploited and the exploiter is just and appropriate, and so perhaps is punishment of the exploiters.

(2) The Concept of Basic Needs.

Suppose all agree that basic needs should be satisfied. One immediate problem is that of what precisely people's basic needs are? Do people need everything they say they do? Musicians need instruments. Homeless people need shelters. Blind people need canes or guide dogs. Smokers need lighters. And so on. Among many need statements we can distinguish three different types of need: (For this point, see Miller, 1976: 127)

(i) 'instrumental' needs, e.g. Smokers need lighters. (ii) 'functional' needs, e.g. Musicians need instruments. (iii) 'intrinsic' needs, e.g. Homeless people need shelters. Blind people need canes or perhaps guide dogs.

When we talk about basic needs, what we are required to satisfy equally is intrinsic needs, the satisfaction of basic needs of subsistence, to all equally, irrespective of desert. Thus, intrinsic needs are such essential human needs as without those humans will suffer severe harms in physical, emotional, and intellectual aspects. Food, shelter, and clothing are essential for at least physical and emotional subsistence. But friendship and a primary education are also essential for minimum decent life and intellectual development. What are intrinsic or essential needs for a minimum decent life is bound to be related to a person's way of life or plan of life.

But, just where the line of the basic minimum or essential needs should be drawn is not always clear. Different countries, and different political groups within a country, will take different views of what constitutes the basic necessities of human subsistence that ought to be provided for all. People in affluent countries may regard a guide dog as a basic necessity for the blind, and special educational institutions as basic necessities for the mentally-handicapped, but people in less developed countries may regard a cane as a basic need for the blind, with only special care and medical treatment for the mentally-handicapped. In practice, therefore, the standard of basic needs to be met by public action has to be set by

each politically organized society for itself, in the light of its own economic situation, technological expertise, and its evaluation of competing claims. However, still the fundamental premise of equal and inviolable human dignities (natural rights of men) requires every state to secure at least the maintenance of minimum-level living standards in that society.

The upshot of the above discussions means that the equal satisfaction of basic needs does not always imply an equal distribution of the material means and intangible resources necessary to such satisfaction. Everyone needs food to live, but the diabetic needs insulin as well. Every child needs education, but the blind child cannot be educated by means of the normal provision made for other children and has to be given special, more costly, facilities. The needs of the diabetic and of the blind child are greater than those of the normal person, and so the provision for their special needs is greater than normal. The distribution of beneficial means is therefore unequal, though the aim is that distribution of benefit, of satisfaction fulfilled should be equal.

(3) Desert, Needs, and Equality.

We have discussed that just and equitable distribution may depart from equal distribution of resources on grounds of desert and basic needs. However, as we have seen, desert and needs are competing claims, necessarily in conflict since no society can distribute its goods both according to desert and according to needs simultaneously. But, we suggest that it can distribute part of its goods according

to needs and part according to desert. The principle of needs is given priority to the notion of desert. Desert should be used to govern the distribution of the surplus goods once basic needs have been equally satisfied. Above the line of the minimum normal life, the principle of needs should leave individual persons free to compete for higher rewards according to their voluntary choice and action. Thus, our scheme of justice is an amalgam of ideas drawn both from liberalism and from welfare egalitarianism (or, a kind of 'liberal-communitarian justice').

Finally, one conclusion to draw is that the relationship between justice and equality is close and intimate yet still less than identical: they may point to different aspects of one situation. We may suggest that the notion of equality refers primarily to both the fair starting position - the equal level of opportunity enjoyed and the state of end result - the equal level of basic needs satisfied, whereas justice refers to the way in which each person is to be treated - according to his or her needs and desert. This particularised treatment fitted to an individual person corresponds to the maxim of justice as 'to give each person his or her due' ('*sum cuique*').

II.6. The thesis of desert and justice discourse as teleological communication.

When we try to implement the idea of desert and justice in real world, we necessarily engage in the discourse of desert and justice. Here the essential characteristics of

desert and justice discourse are three: a deliberative procedure on the matter of distribution or retribution, a teleological reflection on the value of just relations as a virtuous state, and a communicative expression of the meaning of deserved treatment. In the 'circumstances of justice' in which people compete with each other for possessing some resources, positions, or opportunities which are valuable and scarce, the grammar of desert and justice discourse may be formulated like this: "A deserves X in relation to B by virtue of F at the time of evaluation H for the sake of Y in contribution to the ultimate purpose Z." Here X is deserved treatment, B is a fellow human being who enters into a social relation - particular or general, F is desert basis, Y is immediate aim of desert and justice - reciprocity or equilibrium, and Z is the ultimate goal - the common good.

However, the above formula should be understood as the general grammar of moral desert and justice discourse. The grammar of institutional desert and justice discourse (mostly, legal justice discourse) has essentially the same structure and logic as the moral discourse, yet the desert basis F is rather a satisfaction of legal or other institutional qualification than the worthiness of actions or the quality of persons. Let us see some examples of this institutional desert and justice discourse.

If we join in a local council's debate on legislating a new local tax law, or a session of a judicial tribunal concerning what sentence to pass on a convicted criminal, or the meeting of a company board of directors for

determining the rate of salary increase among executives and ordinary employees, I think that we will unavoidably get involved with desert and justice discourse. In case of a local council, is introducing a poll tax at a flat rate fair? If not, what about income or property tax? If income or property tax, what kind of tax exemption or benefit should be introduced? Who will deserve a particular tax benefit? In case of a criminal trial, does this convicted person who committed a crime of theft for providing his sick child with medicine deserve such a sentence? In case of a company meeting, do the executives and employees in this particular section of business who did not contribute to the sale of company products deserve the same amount of salary increase as the workers in factory who did? These kinds of questions are not uncommon.

As we can see in the above cases, legal justice discourse as well as other institutional desert discourse carries special characteristics of positivity-orientedness and practicality-mindedness, namely its relationship with valid law and rule, however this is to be determined. Because this apparent orientation of legality and practicality in the institutional desert discourse makes it different from morality in moral desert discourse, we are frequently requested to examine and criticize the former from the viewpoint of the latter. The aim of moral desert and justice discourse is to promote a better state of justice by narrowing the gap between the criterion of institutional desert and that of moral desert. The nearer the goal of institutional desert to that of moral desert, the better

our chance of attaining a desirable state of social justice. Thus, it is worthwhile for us to consider the general characteristics of moral desert and justice discourse.

First, a deliberative procedure on the matter of distribution or retribution. If the proper business of justice discourse is the discovery or determination of a criterion by which right can be distinguished from wrong, the task of this ethical reflection will be an enterprise of setting the procedures for determining the normative validity of any proposition. I assume without argument that this is essentially a cognitive task. However, this cognitive task takes a deliberate procedure for settling a proper standard acceptable to the members of community. In any given society there may be a wide range of so-called valid laws. The standard of these laws may lie, upon scrutiny from moral viewpoint, on the wide continuum of justice from flagrant injustice to poetic justice; egregiously unjust, clearly unjust, apparently unjust, apparently just, clearly just, and perfectly just. Repealing a grossly unjust law or, even amending an apparently normal but defective law takes no short time not only because of an inherent characteristic of law preserving its security but also on account of the very nature of democratic procedure requiring popular participation and consensus.

The mere fact that a particular standard or norm has been recognized by a community as valid does not establish its validity as such in every real case. If abstract norms are

to be applied to real issues, they should be interpreted in a coherent and universalized manner within that practical context where a multitude of opinions may conflict. How is this procedure possible? What is the presupposition of this discourse? One basic condition should be the universal participation of all interested parties. No one should be excluded. Everyone should be given an equal opportunity to make his or her own claims and to criticize others freely. Thus, no single person in a local council, or in a judicial tribunal, or in a board of directors as in the aforementioned cases, though he or she may be the senior, or the wisest, or the most experienced member in that meeting, is allowed to impose his or her opinion without a proper procedure of rational deliberation. The only norms valid at this stage are those regulating common interests. In other words, normative validity is determined by applying of the principle of universalization. Universalization, the basic principle of a discourse ethic, implies a specific procedure whereby contested norms are accepted once their consequences are debated and understood by all without coercion. This is the basic principle every democratic procedure should take and develop.

This manner of general moral discourse through the employment of the principles of coherence and universalization within that democratic deliberation enables us to achieve a rational consensus on the actual validity and acceptability of a norm. The practical implication of this principle involved here is that a norm is right when it corresponds to a general or generalizable

interest. If tested by the above procedure, a particular interest or a proposition put forward by any individual can get consensus and be accepted by all those involved.

Acceptance of the principle of universalization allows us to turn to the next stage for determining the validity of norms. They are valid when, in the context of practical discourse, they are determined by rational consensus. How could a rational consensus be achieved? We may say that the potential agreement of all participants will be possible only subject to the conditions both of the truth of a non-normative statement and the correctness of a normative statement. Is it attainable? It would be unrealizable in ordinary situations. It would be attainable or at least in close proximity to its goal in an ideal discourse situation by all participants who are equally rational, impartial, and veracious. However, this procedure of attaining rational consensus may be characterized as a formal logic, in the sense that it offers no substantive ethical orientation. Therefore it does not provide a basis for adjudication between equally rational solutions that might be backed by alternative value systems. This means that a differentiation should be made between different approaches to justice which can be derived each from a universalistic procedure. Attaining justice which intends to lead to the common good, requires an additional characteristic to the rational procedure of moral discourse, that is, a teleological element of ethical discourse.

Secondly, a teleological reflection on the value of just relations as a virtuous state. The teleological nature of

desert and justice discourse involves a cultivation of human virtue which is an inherent property of moral desert and justice as an ideal. When we endeavour to match the formula of moral desert and justice that "A deserves X by virtue of F" to a real situation, we are taking part in and sharing the moral property of justice. Why do we say that the matter of justice is a teleological enterprise as well as a virtuous one?

Justice as an ideal does not consist in merely saying what is just; it consists in a certain moral disposition or state of character on the part of persons who strive to attain it. We may recall the celebrated formula of justice made by Ulpian, which stands in the forefront of Justinian's Digest, that justice is not only '*sum cuique tribuere*' (to give each man his due) but also a '*constans et perpetua voluntas*' (firm and perennial disposition) towards procuring *sum cuique*. That 'firm and perennial disposition' is a certain moral attitude, or habit without which justice cannot manifest itself, and it is not again merely a matter of facile intuition, but of intuition ripened by sympathetic experience and by persistent cultivation of practical reasonableness on the part of persons who endeavour to attain justice.

We may find a case of perfect justice only in the judgment of a perfectly virtuous man. However, our endeavour to attain justice in our justice discourse is to take part in this enterprise of cultivating a firm and perennial disposition which in turn enables us to nurture our virtuous character. Let us recall here the famous

American film entitled 'Twelve Angry Men' which depicted a courtroom trial and a deliberation procedure in the jury chamber. Twelve members of jury are deliberating the murder case of an old man allegedly committed by his juvenile son in their quarrel. The testimony of a neighbouring witness and circumstantial evidences produced by the prosecution proves unfavourable to the accused boy. Every member of jury except one man shows strong inclination to believe that the convicted boy is guilty according to his previous record of bad behaviours, low education, poor family background, and so on. One courageous member of the jury expresses a reasonable doubt surrounding the collection of evidence and the testimony of witnesses, and points out the inconsistency and unreasonableness of arguments on the part of other absolute majority members of jury. Other members of jury who started with a strong predisposition against the accused boy are brought through heated discussion to understand the important probable consequences for the boy of the trial and their verdict. The eleven members of jury who initially had no doubt of guiltiness of the convicted boy are persuaded one by one to believe differently; their changed view is brought about by this persistently courageous and virtuous man who firmly believes that justice should be done to every person regardless of his or her colour, race, or, social class. The lessons we may draw, if any, from this film are that attaining justice or implementing justice requires of us our firm willingness to pursue the truth of fact and the correctness of value. Taking Justice discourse seriously

and rendering just judgments are to be understood as elements of human conduct directed towards the firm and perennial pursuit of human virtue and perfection. Particularly, the virtuous nature of justice arises out of, and expresses itself in, a moral attitude toward others. The enterprise to give each person his or her due, or, of reciprocating burdens and benefits in implementing desert is only made possible by our moral actions imagining ourselves into somebody else's shoes, or entering into our 'inter-subjectivity' with others once described as the nature of justice by Giorgio del Vecchio. (For this term, see his 1952: 80)

Thirdly, a communicative expression of the meaning of deserved treatment. When we talk about the deserved punishment of a particular criminal, we mean something. Retributive punishment based on desert is an act of communicative behaviour. Revenge also fits this communicative structure, though with a somewhat different message. What is the message of punishment based on desert, why is it communicated in that especially forceful and unwelcome way? As we have seen, punishment has an expressive function, wherein the punisher condemns the crime. Moreover, in a punishment based on desert, we may see punishment as an attempt to demonstrate to the wrongdoer that his act was wrong, not only to mean the act is wrong but to show him its wrongness. Furthermore, by showing this it generates repentance on the criminal's part and provides him with the opportunity of penance. Punishment based on desert is supposed to achieve this

moral improvement of the criminal by bringing home to him the nature of what he has done, from which he is to realize its wrongness. Punishment based on desert also conveys some messages to the other members of community - victims, families, law officials, and other general public. The messages are that the state corrects the broken order and value, the criminal not only repays his debt to victims but also becomes a new regenerated member of the community after repentance and penance. These aspects of moral regeneration of the criminal and reconciliation between criminal and other members of community, which would be made possible by punishment based on desert, will enable us to understand that the criminal is no longer an outsider from community but a part of it.

II.7. The thesis of dynamic equilibrium and harmony.

In preceding discussions I have examined the principle of fair equality of opportunity, which combines liberty and equality as an essential element of the concept of desert and justice. Also I have argued that the notion of communal solidarity as well as the principle of fair equality of opportunity is the justifying ground of the principle of needs. Here, the discussion of distributive justice or retributive justice based on desert has taken the idea of equal liberty of human beings as its initial guiding principle and the notion of fair play or reciprocity which is again derived from equality as the implementing principle. Thus, what we can see so far is that if a man is

to be treated justly, or he is to be given his own due, he is first to be given equal liberty with other members of society to expend his own effort and labour, and then his own effort and labour is to be reciprocated by commensurate (or proportional) advantage or disadvantage available in the goods (or non-goods) scheme of that particular society.

The notion of proportional reciprocation is one of the intractable issues in the business of justice. This is because of its essential characteristic of being determined by the dynamic social context. This implies that, with regard to our assessment of human desert, the value or disvalue of human characters and activities as well as the goods for human life can be completely and meaningfully understandable only if we are fully informed of the changing meanings and importances of those values and goods in the current social context. Why is this? Let us look at this problem from at least two aspects of the social phenomena, namely a situation of on-going social evolution due to technological development and a situation of pluralizing social values due to diversification of human interests and activities. In other words, we live in a society where the meanings and structure of value are vacillating and even transforming due to our changed style of life. The underlying contemporary social dynamics which force us to re-examine conventional life style and value system are carried out on the one hand by innovative development of communication and transportation technology and on the other hand by accelerating division of labour. Before elaborating further the implications of current

social transformation in respect of value systems, let us look at an ordinary but essentially dynamic scene of proportional reciprocation in our daily social relations.

Imagine a supermarket where many shoppers are forming queues for payment behind several cashiers. Among shoppers who queue up, there may be various kinds of people with different amounts of purchases and ways of payment, a big purchase or a small purchase, and cash payment or cheque payment. A common wish for most of ordinary shoppers would be a quick pay-out by a shortened queue. Persons with more purchases might claim that they deserve a quicker service because of their greater contribution to the shop's sales. On the other hand, persons with less purchases might demand at least equal manner of quick service since they are constant customers though their single purchase each day is small in amount. Persons with cash payments might demand quicker service than those with cheque payment since paying by cheque takes more time than instant cash payment. No single, absolute solution is possible or required for a proper customer service with quick and fair treatment in this case. However, at least one way of fair treatment for all customers would be a proportional service according to their ways of payment and amounts of purchase. Instead of formal equality of treatment for all customers by letting them queue up at any cashier of their choice, we can have proportional treatment of customers according to their different characteristics. We can achieve this by dividing cashiers into two or three groups, for example, one group for cash payment or small purchases, another group for

cheque payment or large purchases, and another group for special customers (the disabled and other needy people). This kind of differential treatment perhaps better serves the objective of equally quick and fair treatment. However, one important point to be made here is that the ideal of proportional reciprocation may be determined and implemented in a concrete case according to particular social circumstances.

Now return to the contemporary scene of dynamic social transformation which may affect our conventional manner of valuation of human activities and even our consciousness of the value system itself. Nowadays it is not surprising that even a single human being can change and expand his or her function and the value of his or her work to a remarkable degree. And this is the case with apparently less effort than before if he or she is properly equipped with the latest technological instruments. Consider, for example, the desert of an individual officer or soldier who was involved in the accidental friendly sortie in the recent Gulf War. A moment's failure in decision-making made a tremendous difference of outcome, as we could see in a fatal sortie at the last stage of the ground battle. Here an American bomber mistakenly attacked armoured columns of allied forces and killed many friendly soldiers. The difference of outcome was so grave that our concern and interest in clarifying which part of human effort and ability, if any, had caused the accident or might have averted the accident otherwise, seems to be stultified. The accused officers or soldiers, who up to the moment of the

accident seemed to have enjoyed a good military career, could ruin their good desert by a moment of mistake, as they failed in the operation of a highly advanced technological equipment which was otherwise of enormous potential benefit to them. Though the case may be an extreme example, its lesson may be applicable to another contemporary technology-dominated context such as the case of performance evaluation in a big corporate body or other information-intensive industry where there is a high degree of competition. A good investment decision may bring an enormous fortune to a company: a wrong one may bring a formidable loss to the company. Conventional ways of job-evaluation might be inappropriate in these situations.

One might argue, nonetheless, that essential modes and characteristics of human relations and value systems are not mutable. Human beings, though they face a new challenge in the current era of technological dominance are still moral agents who are essentially guided and evaluated in their behaviour by common moral norms and derivative social rules. This observation may be true. However, another observation that the rapidly changing situation of technological development in contemporary society such as in the field of medicine, genetic engineering, or information technology can affect theories of normative science is hard to deny. We tend to believe that notwithstanding the scientific development and its ensuing technological utility, the human being is still master of human life and that his inalienable human dignity and worth should be the supreme measure as to the evaluation of human

relations. Although, the normative theory which puts human worth and dignity on the apex of the value system is correct, however, I think that we ought to re-examine the meanings and manners of our evaluation of human activity in light of ever-changing social dynamics.

Here, one important idea which we can use in a fresh look into contemporary social phenomena is the notion of organic solidarity as an integrating feature of social relations. Due to technological development, division of labour has been accelerated. We work at diverse places and perform varied functions. We do not know properly what our neighbours do, but we are connected with each other by our performing social functions. Without relying on a neighbours's good performance of their work, we cannot fulfil our own role and function properly and further our purpose of life. Thus, we live in a society where diversification and interdependence is inevitable. The scope and degree of that situation becomes ever deeper than before. One danger of contemporary society with its tendency of technological dominance and diversification of human role is social disintegration. When people become disintegrated and atomic beings, though being interdependent in their functions, there may be serious disorder and malfunction if people do not properly cooperate with each other. In order to maintain the proper function of society, the value of communal solidarity and harmony should be stressed. Solidarity and harmony, in addition to liberty and equality, as a third generation in the concept of human right, is another essential element to

attain the common good in the society. We set before ourselves a conception of the harmonious fulfilment of human capacity and role as the substance of flourishing life, and we have to enquire into the conditions of its realization. We should consider laws, customs and institutions in respect of their functions not merely in maintaining any sort of social life, but in maintaining or promoting a harmonious life.

II.5. The thesis of institutional natural law.

(1) Rights as institutionalized desert and needs.

In our attempt to clarify the criteria of justice, we have found that social justice or moral justice essentially consists of a principle of desert and a principle of needs. These principles are sources of ideal moral rights and produce fundamental moral claims to establish just relationships or just states of affairs. However, these ideal moral claims to justice, as long as they remain in the moral realm, can not be securely put into effect though they may be aspired to by the majority of people. They may be subject to different or inconsistent interpretations over time, even to derogations or negations due to conflicting interests or changes of situation. The moral rights dependent on these principles need to be firmly recognized as, or transformed into, social rules of justice in order to secure their effective enforcement. Institutionalized rights have thus obvious advantages in these senses of security and enforceability over moral

rights. When moral desert and needs are institutionalized by being introduced into the legal realm, then they are considered as matters of institutional desert, or more correctly matters of entitlement or legal rights.

Legal rights (or simply rights), albeit that their point is to be no more than institutionalized embodiment of the principles of moral desert or needs, can nevertheless be regarded as furnishing a separate, a third criterion of justice. As the legal embodiment of justice, rights are also regarded as the most stable, reliable, and effective means to fulfil social justice. This is expressed in the formula 'to each according to his or her rights'. In order to put such a conception of justice into practice, it is necessary to know what each person's rights are. Rights generally derive from publicly acknowledged rules of law: they do not necessarily depend upon a person's current behaviour or other individual qualities. The principle of legal rights is concerned with the continuity of a social order over time, and ensuring that the expectations persons hold of each other in certain important matters are not disappointed. In this sense we may describe the legal justice to be secured by means of rights as 'conservative'.

We have now three conflicting interpretations of justice which can be summarized in the three principles: to each according to his rights; to each according to his deserts; to each according to his needs. We may divide these three principles between conservative legal justice and ideal moral justice. 'Rights' and 'desert', and 'rights' and 'needs' are contingently in conflict, since we may strive

for a social order in which each person has a right to that which he or she deserves, or that which he or she needs. If such perfectly just societies could be created, the contrast between conservative and ideal justice would vanish, since the actual distribution of rights would correspond to the ideal distribution. However, due to the innate characteristics of rights tending to preserve the current positive legal order with continuity and security, it is apt to diverge from the demands of moral desert or needs. Judgments about legal justice have, as their object, consistency of an act with legal rules; they confirm that a general rule is properly applied to a particular case. Judgments about social justice have, as their object, the content of those rules; they confirm that the rule distributes burdens and benefits justly among the members of a community. Thus, though one important part of social justice consists in respecting the positive rights which people have, there would arise cases in which the transgression of positive rights is a legal injustice, but not a social injustice. This kind of conflicting situation between legal justice and social justice, or legal rights and moral rights causes dilemmas to the people concerned, not only the parties to the legal disputes but also the judges and legal officials. Perhaps, as a way of avoiding this problem we may say that social justice and legal justice apply to different phases of the social process: Social justice applies to work done by legislators, legal justice to work done by judges (or any other persons acting authoritatively in applying rules). But, this statement is

an unacceptable simplification: It assumes a particular theory of sources of law, namely the theory which makes a clear distinction between the legislative and the judicial roles. This view is now widely contested in the Common Law countries as well as in the Civil Law countries. In the Common Law countries, particularly concerning 'hard cases' or 'intractable cases', that is to say, cases where informed people can reasonably disagree about the bearing of the law on the facts of the cases, there exist heated debates whether the clear borderline between law-making and judicial decision-making can be drawn. Two different theoretical approaches to 'hard cases' are possible. As to this issue, we might conclude that a judge 'makes' law in hard cases, that is, he acts as if he were a legislator. Then, his decision may be a proper subject of evaluation by the criteria of social justice. And even in the narrowed issue of judicial decision-making for the sake of legal justice, debates continue on the questions such as those raised by Ronald Dworkin whether there is always one right answer to the hard case and the judge has a duty to discover it by resort to the legal standards other than the rules. In the Civil Law countries, especially those of Continental Europe and Far-East Asian countries like Japan and Korea, judicial precedents are not considered as formal sources of law. This does not mean that the courts in these countries fail to rely on general principles of fairness or justice. The use of those nonformal sources of law has also long been maintained by legal scholars. One positive example of allowing the application of nonformal

sources of law is Article 1 of the Swiss Civil Code, which directs the judge to decide cases unprovided for by statute or customary law according to the rule 'which he himself would lay down as legislator'.

However legal disputes are never decreased but aggravated partly due to the disagreements between legal positivists and natural lawyers with regard to understandings of the concept of law and legal obligation. The legal positivists will deny that the existence of a legal system, of valid laws and legal obligations requires accordance with any particular moral standards: they may thus still describe a positive body of law, whose valid laws impose legal obligations on its citizens, as a legal system, however fundamental the moral requirements it breaches. The traditional natural lawyers will insist that at least some of those moral principles, which both camps agree to be morally binding on any legal system, are so in virtue of their internal relationship to the concept of law itself: and thus that law or legal system which radically fails to accord with these principles cannot be allowed the status of valid law, or be said to impose legal obligations. The content of their disagreement seems clear. Can we specify purely factual criteria for the existence of legal systems, valid laws, and legal obligations - criteria logically independent of any moral standards by which we may go on to assess the law? Or does the concept of law itself include certain moral criteria, by which valid laws are to be identified as well as assessed? To answer this question, I think we need not a single-handed approach by

any legal theory of legal interpretation but an integrative approach or multi-dimensional theory of law. An integrative theory of law I shall propose consists of three different approaches to law, namely, an analytical approach, a socio-historical approach, and an ideological approach. (This idea was particularly inspired by the writings of Jerome Hall, Edgar Bodenheimer, and Harold J. Berman. See Hall, 1958: 37-47; Bodenheimer, 1974: 163-68; Berman, 1988: 779-780) A theory of 'institutional natural law' as a corollary of the integrative jurisprudence will be formulated to be an appropriate model which can compromise the differing approaches to law principally by allowing constant imbuing of the institutional legal setting with the principles of constitutional morality of any given society. (Compare with Richards's similar idea of 'methodological natural law theory' which tries to combine the institutional aspect of law with a natural law doctrine; however, his theory is more inclined to stressing the abstract idea of natural law and the role of critical morality than mine. See David A. J. Richards, 1977: 33-4, 178 and 265)

(2) Institutional Natural Law.

The reason why I prefer an integrative jurisprudence to a single-handed theory of legal positivism or natural law is that each of the latter two theories is deficient in the proper understanding of the meaning of law. Legal positivists have insisted on the logical separability between law and morals on the ground that law, though a

normative system, is at most an institutional fact while morality is a system of value. Some positivists have argued that since there are no cognizable objective values in the moral system, the matter of legal interpretation in cases of legal adjudication should firmly remain in the realm of positive legal rules, or at most positive social rules (e.g. Hart). Because of this separation of law from morals, they also have argued, legal positivism is superior to natural law doctrine for the former can facilitate the moral criticism of legal system. I doubt the merits of these arguments of legal positivism. There can be at least two points of criticism against legal positivism. Legal positivism is apt to allow enforcement of an unjust law because of its imperative concern for the consistency, certainty, and predictability of legal order. Furthermore, in so far as legal positivists insist upon the subjectivity of value systems, any moral criticism that is directed by them against the existing law through public opinion or legislative amendment may involve a long and tedious procedure to bring about any change in the consensus or the majority opinion; and they are debarred from asserting any fundamental grounds of rightness other than consensus or majority opinion.

Traditional natural law doctrines (notably versions of Thomism) have not been immune from criticism. For all the merits of their allowing internal evaluation of legal rules from the aspects of justice and conscience, they are liable to blur the separation of power between the legislative body and the judicial body. Extreme natural law theories

have been charged with sacrificing the certainty of the current legal order because of their primary concern for justice and reasonableness over incumbent state policy or lawmaker's will.

However, in recent decades legal positivists (e.g. MacCormick and Raz) and natural lawyers (e.g. Finnis and Fuller) have begun to accommodate each other's merits in various forms. Legal positivists acknowledge that a legal system may expressly include certain moral norms, such as due process and the equal protection of basic rights, which govern the application of legal rules. MacCormick, for example, acknowledges that there are principles and values which lie behind legal rules and are employed in the language of justifying rationalizations of the valid legal rules. (See 1985: 8)

As legal positivists have increasingly taken account of the effect of morality on law, so natural lawyers have increasingly taken account of the political elements in law. Natural lawyers acknowledge that the morality by which law is to be tested includes the moral duty to preserve the legal order imposed and enforced by the state. Lon Fuller, for example, argued that law is compounded of reason and fiat, of order discovered and order imposed, and to attempt to eliminate either of these aspects of the law is to denature and falsify it. (See 1946: 376 and 382) From this modified viewpoint of the idea of law, the principle of justice and reasonableness, whose objectivity the legal positivists tend to doubt, has a limited role while the competing principles of utility and legal certainty are

given equal importance to achieve the purpose of law.

Here the important point to be made is that legal positivism and natural law doctrine are complementary rather than rival theories of law, and should be taken to be equally necessary approaches to understanding the complex phenomenon of legal institutions. Thus, my strategy to formulate an integrative theory of law is to synthesize three approaches - an analytical, a socio-historical, and an ideological one.

Under integrative jurisprudence so conceived, law may be defined as the institutional enterprise or systemic activity of subjecting human conduct to the governance of legal rules by legislating, adjudicating and administering acts to achieve justice and the common good among the members of the society. This definition of law as the institutional enterprise or systemic activity to control or guide human conduct entails a multi-faceted approach to understand its true nature.

Any social institution, whether political, religious, educational, or legal, can be established as a system by certain habitual practices in conformity to norms for the realization of human goods. To be a viable institution, it should carry well-defined components within itself. Three essential components of the institution as a going-concern may be pointed out analogous to the organization of the human being itself. They are normative idea, functional operation, and factual body. For example, let us see the institution of education: there are normative requirements and goals to educate people toward desirable members of

society; for this purpose there are essential functions of education by ways of teaching, research, student counselling and so on; there are also physical entity to be designed for and also to be identified as running the business of education, such as educational codes and regulations, educational organizations - primary schools, universities, etc., and their constituents - teachers and students. Likewise, law as a normative social institution should be seen essentially carrying these three dimensions: law should strive for its goal to attain justice and the common good in social relations; for this purpose law functions as a guide to the proper administration of human activities or a means to dispute-settlements; there are physical entities to be designed and to be identified as carrying out the business of law, such as legal codes and precedents, law organizations - legislative body, administrative body, and judicial tribunal, and their constituents - law-makers, law officials, and judges.

But traditional schools of legal philosophy - legal positivism, natural law theory, and the socio-historical school, have each isolated a single important dimension of law or legal institutions. The analytical school of legal positivism treats law essentially as a particular social reality dependent on political will: a factual body of rules posited by the state, having its own independent self-contained character separate and distinct from both morality and history. The natural law school tends to treat positive law as rules but they test the rules of positive law by moral principles, which they consider to be equally

a part of law. The socio-historical school treats law in terms of both rules and moral principles. Unlike the positivists, however, they tend to be more concerned with the rules of customary law than the rules of enacted law and, unlike the natural lawyers, they are apt to be concerned with those specific moral principles that correspond to the character and traditions of a given people or a given society rather than with universal moral principles.

Though varied their focus and understanding of law may have been among the three competing schools, their eventual goals of law have tended to converge towards the ideas of justice and the common good. But what has divided the three traditional schools most sharply has been the assertion of priority among three seemingly competing approaches to justice and the common good, namely legal entitlement and certainty, fairness, and appropriateness to social context. Here, what an integrative jurisprudence tries to achieve is to internalize the moderation of competing claims of legal purpose or purposes within the business of single judge or legal official while alleviating the burden of abstract speculation with regard to employing seemingly diverse principles of moral justice and conscience. The formulation of institutional natural law as a corollary of integrative jurisprudence enables judges or legal officials to grasp law comprehensively by bridging the law as it is and the law as it ought to be and furthermore drawing upon the rich source of value constituted by living custom and tradition into a contemporary dynamic operation of value within the

legal institution. It also enables judges or legal officials to concentrate on the discovery of positive morality from constitutional principles while it separates itself from any suggestion that there is a necessary connection between law and any critical morality.

Thus, law, if it fulfils its institutional functions of providing order, certainty, and justice properly to serve the common good, partakes both of the world of empirical reality and of the realm of normative ideals. The functional element of law carries two faces, a factual and an evaluative one: the factual face of legal function lies in citizens' recognition of law as mere law and its minimum effectiveness; the evaluative face is the matters of eufunction of law and citizens's acceptance of law as a valid law binding in conscience. Because of this functional element, our approach to law forms a bridge between the is and the ought, a bridge built to facilitate the transition from a social condition exhibiting a great deal of conflict and violence to a state of peace and social well-being in which exists, in addition to multifarious individual pursuits of self-interest, a sharing of the common good.

The upshot of above discussions brings forth a clearer picture of three criteria of the validity of law, namely a factual test, a functional test, and a normative-eufunctional test. First, the factual test may be concerned with authoritative sources and procedures by reference to which the status of putative law is determined. Secondly, the functional test may be initially concerned with the minimum effectiveness of law and its

being perceived as a law. Thirdly, the normative-eufunctional test may be concerned with the reasonableness of law's content and its acceptance by citizens as a valid law due to its conformity to ideological purposes of law.

The practical applications of institutional natural law are to put stress on constitutional principles as the embodiment of positive common morality at a given time in a given politically organized society. Thus, the tasks of a judge in any constitutional adjudication are to draw right answers in a coherent way from the body of constitutional principles. I believe that the appropriate way to interpret constitutional principles is to adopt an integrative jurisprudence. There may arise many controversial constitutional issues, such as abortion, pornography, capital punishment, religious education in public schools, gender equality and other crucial issues of conflict between individual liberty and public policy. The integrative jurisprudence as a synthesized approach of legal positivism, natural law theory, and socio-historical theory may enable us to weigh and balance the demands of positive law, institutional common morality, and traditional values in a coherent and harmonious way to achieve justice and the common good.

III. Critique of Rival Theories.

So far I have argued for a theory of justice which is primarily based on the notion of teleological desert. The

notion of teleological desert has been interpreted by and supported from the outlook of a liberal-communitarian value (or, a republican value) and a perfectionist virtue ethics. Is this theory tenable? Can this theory give a more plausible answer than rival theories to the current perplexing issues of distributive justice and retributive justice arising in contemporary society? I have argued for this in terms of my theory positively at various points in this thesis partly by defending mine and partly by refuting rival ones. Here, I shall summarize in a comprehensive manner why my theory is preferable and rival theories deficient in dealing with the matters of reward and punishment.

As to the notion of teleological desert there may be attacks from both sides, both from typical retributivism and from utilitarianism. The underlying perfectionist telos in my interpretation of human desert, which entails the priority of the good over the right, is liable to be attacked from the right-based liberals and Rawlsian contractarians. Again my view of liberal-communitarian value may be refuted by strict communitarianism for being less thoroughgoing in the commitment to community tradition and value. However, I have defended my theory by pointing out the deficiencies of rival theories which are particularly influential in contemporary debates on justice. Let us see some salient points in our previous discussions.

First, my theory starts with the notion of desert on the same footing as typical retributivism, but diverges from

the latter in the interpretation of the scope of desert. Typical retributivists who advocate just deserts as the criterion of criminal punishment focus on past conducts of offenders. The core retributivist idea is that those guilty of certain sorts of acts, whatever they are, which ought to be criminalized in a society, deserve to be punished; those innocent of such acts deserve not to be punished. Some retributivists take this idea as a bedrock intuition, others as an intuition or an intrinsic feeling that can be made plausible by rational analysis. All agree, however, that it dictates essential requirements to be satisfied by a criminal justice system.

Essentially right though the demand of just desert theory is, it stops short of providing us with a complete account of justified punishment; its backward-looking viewpoint ignores the ever-changeable, developmental nature of human beings in regard to the assessment of conduct and character of a criminal so that it entails unnecessarily a rigid retributive system of punishment. Furthermore, it does not offer an answer on the issue of what kind of punishment is fitting in a particular case within a range of equally plausible proportional punishments. In this sense, the mixed theories which combine retributivism with utilitarianism appear more promising. The various attempts among mixed theories, particularly the rule-utilitarian approach espoused by Rawls in his earlier writings, or Hart's two-tier theory which combines utilitarianism as the general justifying aim of punishment and the principle of justice as the distribution of punishment, or another

similar account such as the permissive desert theory of punishment espoused by D. D. Raphael, apparently solve the problem of a single-handed retributivist approach. However, the problem in the above three mixed theories is that they take utility as the ultimate justifying reason of punishment so that there may arise some suspicious cases of sacrificing justice for the sake of maximum utility in a society. My teleological desert theory of punishment like other similar accounts of teleological retributivism does not want to go so far; it regards punishment in accordance with desert as the central justifying factor, whilst requiring a utilitarian justification for the infliction of punishment in individual cases. My teleological desert theory particularly stresses the function of moral communication derivable from a deserved punishment between punisher and punishee on the one hand, and between wrongdoer and society as a whole on the other hand.

Secondly, the teleological desert theory with its forward-looking element of human telos may share a characteristic with utilitarian consequentialism. However, the former differs from the latter in a fundamental point. The self-fulfilment at which teleological desert aims is founded upon a conception of definite end-states which people are supposed to achieve by their conducts, whereas utilitarianism is open-ended in sanctioning whatever produces the greatest amount of happiness. Utilitarianism with its emphasis on the maximization of good consequences is liable to criticism for its tendency to justify that the ends justify the means or acts are judged to be morally

right or wrong by their outcomes. One frequent criticism against utilitarianism is that it can justify the punishment of an innocent person. If punishing an innocent person, by torture or execution, say, would produce more good consequence than any alternative act, it would seem to be a utilitarian duty to punish that person. We can argue here that it is not consequences, or at least not consequences alone, which determine what is right or wrong.

Thirdly, I argue that Rawls in his later writings, like all other contract theorists, seems to have a defective understanding of the relation between the individual and the political community. Contract theorists suggest that free, independent, fully formed individuals can deliberate about the kinds of mutual connections and limitations to which they should severally agree. They maintain that each individual, considering personal interest in the context of a general understanding of the empirical requirements of physical and material security, comes to regard some form of political association as advantageous. But if these empirical requirements happen to be different, there would be no reason to agree to enter into the political community.

This understanding of the political community crucially affects the way Rawls poses the question of justice. He distinguishes between obligations all of which are accounted for by the principle of fairness, and natural duties which, in contrast with obligations, apply to us without regard to our voluntary acts. (Rawls, 1971: 114) He

argues that justice is not composed of natural duties, because the content of the principle of justice is defined by a specific kind of voluntary act: A group of person must decide once and for all what is to count among them as just and unjust. The choice which rational men would make in a hypothetical situation of equal liberty determines the principles of justice. (See *ibid.*, 12)

I think that this characterization of justice is questionable. It seems to rest on a mistaken view of the political community. Political life has an important natural component. We are beings so constituted that we can achieve development and satisfaction only within a political community. For this reason, it is misleading to see the political community as entirely produced by choice or agreement, like in the manner of a business contract. The error would be in no way mitigated if the contract is viewed as a theoretical reconstruction rather than as a historical actuality or practical requirement. This is because as human beings, our separate existences are linked in important ways prior to our application of reason and will to the construction of a common life. If this is so, then it is necessary to explore the ways in which justice, one of the cardinal virtues of community, expresses these links - that is, the extent to which justice must be conceived of as consisting of natural duties. The basic principles of justice can be adequately understood in this manner.

Also Rawls's approach seems to rest on a dubious epistemological claim about principles of justice. We do

not seek answers to mathematical puzzles by asking what various individuals would assent to. Rather, the independently determined answer would serve as the criterion of rational assent. Of course, if the answer is correct we usually assume that a rational individual with the requisite background knowledge can be led to agree. Similarly, if a proposed principle is just, we may believe that a rational individual would assent to it, but there is no a priori reason to assume that the assent is the source of justification for the principle. To the extent that Rawls's argument is contractarian, it seems to assume that no alternative mode of argument leading to an independent criterion of justice is possible. But there is no reason to believe that this is the case, especially in light of Rawls's assertion that many kinds of moral principles rest on non-contractarian grounds.

CHAPTER 9. KOREAN CASE

I. Contemporary Issues of Korean Jurisprudence.

In this chapter I shall consider matters of justice in the Korean context with particular reference to the contemporary issues of just reward and criminal punishment. My aim here is to verify whether the principles of justice and law vindicated in previous chapters are plausible and applicable to give guidelines to the vexing problems of injustice or inequity in contemporary Korean society. As the decades-long authoritarian rule gradually fades away in Korea nowadays mainly due to past strenuous efforts by the people for democratization and humanization of their political and social system, they now have to find ways to reach social consensus on urgent reforms of political, social and economic institutions. The main item on the current agenda of democratization and humanization is to achieve sustainable social justice with continuous economic development. However, on the way to promote that task another vexing problem ensues: as the control of the previous authoritarian-type state weakens, politically tinged violence and brutality seem to be rising. These days we can observe that not only students but also workers start to resort to violence to achieve their demands for radical reform in some parts of the existing inequitable economic systems and relations. Many intellectuals voice their sympathy for the main ideas behind the students' and workers' demands for fundamental reform in the existing

distributive system, though not for their resort to violent means. The people's increasing demand for fundamental economic reform in the income and property distribution system seems to be justifiable to some extent in the light of the previous long period of one-sided government policy in stressing economic growth while neglecting an equitable distribution of the fruits of that economic growth. However, this should not mean that the currently established constitutional order of a liberal welfare state may be radically changed or overturned abruptly in favour of the radicals' violent demand for a far-reaching socialist type of egalitarian system. The end of political reform in favour of a more egalitarian distributive system, however strongly arguable or clearly acceptable in relation to some parts of the economic system, cannot justify any means whatever for achieving that end: it is doubtful whether any new just order or good society can be brought about by recourse to violent means or revolutionary upheavals. The reason for this view may be drawn from the past historical experiences that political violence is liable to bring forth yet further political violence, and revolution tends to provoke counter-revolution.

Thus, we should aim at building a consensus with least friction in order that a democratic and peaceful style of conflict-settlement through compromise and mediation may emerge and give rise to a patient and enduring struggle for a long-lasting justice rather than falling for the illusory temptation of short-run revolutionary justice. The democratic and peaceful way to rectify past injustices and

to restore social equity will be only made possible by developing a shared common sense of justice among the great majority and applying it ardently to political and legal practice. Here, the sharing of the common sense of justice requires that people deliberate about the substantive criteria of justice and form their opinion by employing sincerely their three common means of moral knowledge, namely, sound intuition, impartial spectator's sympathy, and rational thinking and discussion. I have proposed in previous chapters that the only tenable criteria of justice for contemporary democratic capitalist society approachable by employing the above three means of moral knowledge are desert, needs, and legal right. Thus, what Korean society now needs in order to establish a more equitable and fair political and economic system is first and foremost that the people should strive to nurture a common sense of justice and develop a habit of practising it in a democratic and peaceful manner. It may be worth stressing again that developing a habit of rational discourse in dispute-settlement procedure and observing the rule of law in that matter will be also vital if Korean society is to realize justice and the common good.

But are these ideas of western style democratic procedure and the rule of law really plausible in relation to Korean society or applicable to solve its problems? Are these ideas viable for a society where traditional morality and value system of Confucianism and Buddhism still play a great role in customary matters? Western style political principles of democracy, the rule of law, and the liberal

welfare state seem now to be ideas incorporated into the positive legal order of Korea according to its Constitution. It is also, however, the case that traditional authoritarian ways of dispute settlement and a community-oriented value system are still living custom. Let us examine this issue in more detail.

II. Traditional Confucian Ideas of Justice and Law.

II.1. Critical synthesis needed.

In this section, I shall examine the traditional Korean and Confucian ideas of justice and law. The aims are to investigate how they have been developed and preserved in the social milieu, and to explore whether there are any gaps or discrepancies between traditional ideas and usages and the Western ideas of justice and law which were implanted when Korea launched Modernization.

Notwithstanding the fact that so-called 'Westernization' and 'Modernization' have been proceeding very rapidly during the past decades in Korea, some traditional mores and basic moral ideas which had survived several millennia have proved very sturdy and resistant to change. In spite of our professed belief in the political ideals of the West and our eagerness to adopt them as our own, we have not succeeded in assimilating them into our system or in creating a well-ordered synthesis. Having made up our mind in favour of things Western, we have rushed head-long into the task of building a new political order modelled after that of the West on top of the existing order. In the

process we have paid little heed to whether the newly attempted superstructure was a viable one or whether it could be made compatible with the indigenous substratum.

We witness daily our politicians and intellectuals mouthing such phrases as freedom, rights, democracy, the rule of law, etc. as if these concepts have been the sacred symbols of our culture from time immemorial. They sound as if they know what they are talking about. And they, of course, assume that these symbols are meaningful to their listeners too. What they fail to realize is the fact that Korean linguistic equivalents for these concepts are of recent coinage, and therefore, devoid of the cultural content that makes their counterparts in the Western languages meaningful cultural symbols. Furthermore, the Korean linguistic equivalents assigned to these concepts are the composites of several words that had been impregnated with an entirely different cultural content. These words had acquired a different connotation in the course of their being used for symbolizing different values in our culture during past centuries. As a result, these concepts do not strike the same responsive chord in a Korean as they do in a Westerner.

As a Korean jurist Pyong-Choon Hahm has observed, the problem here is not only one of semantics; it is much more substantial. It is directly concerned with the desiderata of the Korean political culture itself. Does an average Korean really want and desire the rule of law as he understands it? Do the Korean rulers really believe that 'freedom under law' or 'justice according to law' is a

practical ideal at present? Whatever answers one may give to these questions, it is of paramount importance for those who are concerned with the Korean situation to gain a clear initial understanding of these concepts in the Western political tradition and then of their significance in the context of the Korean political tradition. (See Hahm, 1967: 6)

Thus, it seems to me that crucial tasks for contemporary Korean jurists are to investigate some basic political ideas and jural terms, such concepts as justice, utility, freedom and rights, which have been transplanted from the West to the Far-East in an integrative approach to jurisprudence, and to critically re-evaluate their suitability and viability in a syncretic way with the traditional ideas and values.

II.2. Neo-Confucianism as the state ideology.

Situated as it is on the eastern periphery of the Asian continent, the Korean peninsula has been placed under the dominant influence of China from an early period. Although there is a danger of any student of Korean history taking the Chinese cultural pattern and symbols in Korean culture at their face value, nevertheless one cannot but be impressed by the extremely high degree of Sinification of Korean political culture.

The single greatest force for Sinification has been Confucianism. Confucianism was most effective as an agency of Sinification especially during the Yi dynasty (A.D. 1392-1910) when it was established as the official ideology

of the state. The particular school of Confucianism that was adopted as state ideology by the Yi rulers was the teachings of Chu Hsi (A.D. 1130-1200) and his predecessors of the Sung period of China (A.D. 960-1279) and this became the established doctrine. (See Youn, 1986: 570)

Korean Confucianists believed that the most important attribute a ruler had to possess was virtue and virtue was thought attainable through rational knowledge. What distinguishes man from beasts is that he has reason (li). Through this faculty man is able to comprehend the Way of the Universe. By knowing the Way he can distinguish right from wrong. Since there was only one Universal Way, the correct knowledge of which constituted virtue, namely, humanity(jen), righteousness (i), propriety (li), and wisdom (chih).(See Chiu Hansheng, 1986: 130)

The law of nature and the moral law were one and the same. According to Chu Hsi's theory of the operation of the Principle of Heaven (Way of Nature), human ethics and practice cannot depart from the operation of the Principle of Heaven. In other words, man must practice introspection and self-scrutiny in his daily practice and relationships with his fellow men to eradicate completely mundane desires so that the Principle of Heaven will operate within him.(See *ibid.*, 125)

Also no distinction was made between family ethics and state (or political) ethics. As in the universe where heaven and earth are the bases, so in the society, husband and wife are the bases. The family, therefore, is the foundation of social organization. Since the state is a

part of society, so the family should also be the foundation of the state. (See Hsü, 1932: 87)

Having posited that an accurate and complete apprehension of the idea of good (or, the Way) was the basis of politics, there was little need for positive law as against public opinion or custom. According to Neo-Confucianism, just as in Chinese legal history, the rule of virtue is above the rule of law. Dispute settlements were made primarily according to the concepts of 'human sentiment' (ch'ing) and 'human reason' (li; note a word 'li' below with a same phonation and a spelling but different meaning, 'propriety'). Hence, the rule of noble conduct derived from the Confucian teachings and practices became a universal system of ethics for all people, irrespective of rank and class.

The rule of law advocated by the Legalist administrators and the law-makers, which was little different from a rule of punishment or a rule by autocratic decree, has never been considered as a desirable goal of politics in Korea. In fact, it is a direct antithesis of what the rule of law means in the West today. It had also been an antithesis of what a good politics should be in the Korean political tradition. It is because that law was considered as an instrument of chastising the vicious and the depraved. It is little wonder that the ruling elite considered law to be beneath its dignity. The concept that law may apply only to barbarians or to ignorant masses, and never to properly learned persons or to rulers was strongly rooted in the Korean thought, owing to the influence of the Confucian

teachings and practices. A noble person has better things to contemplate. Though he knows no specific provisions of the code, his actions are never to be in violation of the law, not because he fears punitive sanctions imposed by the state but because he regulates his conduct by a higher principle of life. Due to this belief, the rulers regarded themselves as not only being above the law but also that they ought to be above the law. (See Hahm, 1967: 19-21)

However, it was originally in China that while the Confucian ethics was considered by most rulers as the ideal system of norms to guide the life-style and the conducts of people, penal laws, formally applied only to serfs, came to gain general acceptance among the Legalist intellectuals as an effective means of crime prevention. In view of the fact that many people, noble or humble, had grown so corrupt and unruly that they were no longer able to be restrained by the gentle code of the Confucian teachings and rituals, it was natural that some administrators influenced by the Legalist thinkers came to maintain that strict and equal punishments should be meted out to all transgressors of law. (Liu, 1955: 105) I shall examine this Legalist ideas and tradition in more detail shortly.

Here, what may be thought to come closer to the Western concept of law in a broader sense is the Chinese concept of 'li' (propriety or, rites). 'Li' is broad enough to encompass all the usages and conventions of the Chinese civilization tried by the Confucian rationality. (See Fung, 1952: 68)

In a narrower sense, it means etiquette and manners. In

a broader sense, it means an understanding of the Cosmic Reason. It is a moral expression of the Way of the Universe. When both the ruler and the ruled act according to 'li', harmony prevails. The virtuous live by it. When a society is ordered by law or by the threat of punitive sanctions, its members evade it with impunity and feel no shame. But when a society is ordered by 'li', its members not only behave properly but also know shame. The rule of 'li' not 'fa' (law) was the ideal to be pursued in the Korean political tradition. (See Hahm, 1967: 22)

However, we may recall that while Korea experienced a far-flung Sinification since fifteenth century in which Neo-Confucianism was moving into a position of dominance intellectually and (somewhat more slowly) socially, at the same time a highly developed set of Chinese legal norms was being received and adopted in the institutional arena. During this period Korea experienced the simultaneous adoption of perhaps the most rigorous Confucian formulations on law - those of Chu Hsi - and the comprehensive incorporation of developed Chinese legal practice, the Ming Code. In a sense, the Ming Code was also the most 'Confucian' of the Chinese Law codes to date, representing the culmination of several centuries in which the social values of the Southern Sung thinkers had become increasingly embodied in the sanctions of penal law. Here the situation in Korea from the beginning of the Yi dynasty has implications for the question of the so-called 'Confucianization of law' discussed by scholars of Chinese thought and institutions. Thus, it is worthwhile examining

some salient ideas of justice and law in traditional Chinese legal history to understand the background of legal thought in Korea.

II.3. Justice and law in Confucian philosophy.

There are two trends of thought in the traditional Chinese legal history. One is legal positivism envisaging written law as a primary source of rules and the other is a view giving priority to customary laws. The former advocated the absolute supremacy of written laws and the strict observation of statute. Hence, legal decisions were supposed to be strictly based on the codified written laws, crimes were determined and punishments were meted out according to statutory provisions.

In legal positivism as advocated by the Legalists in ancient China the idea of equitable judgment was that it had to be based on 'Lu' (statutes) and 'Ling' (ordinances). That is to say, by equity and justice was meant that the punishment had exactly to fit the degrees of crime committed by the criminal and his status at the time of the crime according to the specific provisions of the code.

The other, which was favoured by Confucianists in ancient times, advocated that adjudications were or ought to be made by judges according to ethical or moral principles. Not unlike the natural law school of thought in the West, equitable judgment was based on "ch'ing" (human sentiment) and "li" (human reason), which are the basic attributes of human nature as the Heaven-made law with which humans ought to conform. (See Tsao, 1962: 32-42) Confucian classics

at times served as the norm of reference for judicial decisions in ancient China.

Thus it may be said that the Legalists favoured the written law, whereas the Confucianists favoured the unwritten law. Hsün-tzu (c. 298-238 B.C.) who can be viewed as the bridge between these two trends, recognized the need of both written and unwritten laws. Hsün-tzu, though he was a Confucian, shows the influence of Legalist thought most clearly in his acceptance of law as a necessary part of government. On the other hand he differed from the Legalists in refusing to treat moral example as irrelevant to government. For him the best solution was to combine the two techniques, moral example and law. (See MacCormack, 1986: 247) The ruler himself should be virtuous and should see that the laws enshrined and enforced moral principle.

With respect to the use of punishment Hsün-tzu advocated a doctrine that again seems to combine Legalist and Confucian elements. Hsün-tzu not only emphasised the retributive function of punishment but also its deterrent function. But his general idea of punishment was that the punishment should be in proportion to the degree of wickedness exhibited. Hsün-tzu's thinking about law and punishment represents what was portrayed as the ideal system of government virtually throughout the whole of Chinese imperial history. (See MacCormack, 1990: 37-8)

The important conclusion to draw here is that the principle of equity in this view brings together the two trends interwoven in the life of the legal system in traditional China, namely, the positivistic tendency

according to which the standard of equity is in the statute law, and the customary tendency according to which the norms of case interpretation are based on "ch'ing" (human sentiment) and "li" (human reason).

The idea of equity and its main features are expressed in the following three words: Kung Cheng (public righteousness) or Kung P'ing (public equity); P'ing Heng (balance) or Chun Teng (equality); and Cheng Tang (right due) or Ying Tang (according to one's oughtness). (See Kim, 1981: 83-5)

First, the word 'Kung Cheng' or 'Kung P'ing' is equivalent to the English word 'justice' not in the sense of abstract principle so much as in the sense of law as the public standard of measurement for social conduct. In order to have an equitable decision we have to have some public standard which should not be corrupted by private desires or feelings whether this standard be the written law or the unwritten morality based on "ch'ing" and "li". What the Legalists advocated was to establish such an objective standard concretized in the written body of laws. And what the Confucian-influenced courts did was to resort to the objective standard of "ch'ing" and "li" where the case required and when the written statutes did not adequately cover the circumstances.

Secondly, the word 'P'ing Heng' or 'Chun Teng' denotes the idea of balance on the scale or measurement, and has the meaning of the English word 'equitable'. The principle latent in the concept of equity in Chinese traditional law is the balance of interests or balance between the offence and penalty in their like degrees and their like

relationships.

Thirdly, the word 'Cheng Tang' or 'Ying Tang' has a sense of distributive justice, that is, the literal meaning 'right due' or 'according to one's due' expresses a notion of oughtness (or matter of course) in reward or in punishment according to the degree of meritorious desert or the degree of offence. Both morality and law had their basis in Heaven. It is morally right to punish criminals and in fact criminals ought to be punished because the punishment is what is due to them.

In Chinese traditional thought, everything and everyone has what is due according to one's status and function. (See Kim, 1981: 128 and 131) To act in due degree is the maxim of propriety or the rule for proper conduct. To adjudge in due degree seems to be the maxim of law. When one's dues are properly met, in punishment as well as in reward, equity is maintained and social harmony will prevail. Thus, to find what punishment is the one exactly due to the offence in various circumstances and with regard to the relationships of the persons involved is to render an equitable decision.

Thus, law has its origin in social justice. Social justice has its origin in what is fitting for the many. What is fitting for the many is what accords with the minds of human beings. Herein is the essence of good government. (See Bodde, 1963: 381)

Also the ideal images of human being and society are embodied in the Doctrine of the Mean (Chung Yung): "It is only the person, being most trustful and sincere in all the

world, who can completely fulfil his life. Being able to fulfil his own life in a perfect way, he can also completely fulfil the life of other persons. Being able to completely fulfil the life of other persons, he can, furthermore, completely fulfil the life of all creatures and things..."(*Chung Yung*, ch. xxii) Thus, from the above passage, when a person is elevated into the plane of ideal perfection through his own creative efforts, he may become godlike in this world. The person so depicted is the man of ideal perfection. Confucius called him a sage in whom all excellences and values are accumulated and realized in fulness.

Based on the above discussions, we may summarize the general characteristics of the traditional Chinese idea of justice and law as follows: it is more the rule by moral principle of Confucian *li* than the rule by positive law of the Legalists, more the customary law than the written statutory law, more paternalistic than individualistic, and more autocratic communitarian (*Gemeinschaft*) than democratic liberal (*Gesellschaft*). Thus, there is a danger of authoritarian rule in traditional political morality if we stick to extreme Confucian moralism. Ruling elites who monopolise learning and power have tended to take for granted the absolute rightness and superiority of their moral view because of their learned background in Confucian ethics and have shunned to concede to their opponents any scope for compromise or negotiation. By contrast any sudden switch to a western type of liberal democracy, especially one committed to hyper-individualism, and an extreme stress

on individualistic liberal rights, will clearly involve a profound conflict between the traditional and the adopted ideology. Hence there would be a grave risk of political disorder and social disintegration. My arguments so far have thus tried to avoid any absolute claim of superiority on behalf of either Western-style political morality or Eastern-style traditional morality. The present thesis argues for compromising ideas, namely liberal-communitarian values, institutional natural law, and desert-based justice as explained in the preceding chapters.

III. Constitutional Adjudication as to the Crime of Adultery.

III.1. Overview.

In this final section, I shall consider the issue of the constitutionality of the crime of adultery in the Korean context. The reasons why I select particularly this issue as a test case for the plausibility of my thesis are as follows. Firstly, the issue of adultery seems to raise one of the most acute problems of moral clash between an individual's autonomy and right to pursue happiness in sex life on the one hand and a person's communal responsibility toward his or her marriage partner and children, if any, on the other hand; here arises a potentially intractable issue of moderation of those conflicting values. Secondly, the question of whether adultery should be regarded as a crime which is subject to legal punishment seems to be one of the demarcating points between a Western-style liberal criminal

policy and an Eastern-style traditional community-oriented one. Thirdly, the current Korean Criminal Code with a provision punishing adultery with up to 2 years imprisonment seems to provide for us a useful case for examining the aim of punishment by criminal law and the measure of just and appropriate punishment in comparison to other sexual offences, such as incest, homosexuality, sodomy, or bestiality.

The issue of the constitutionality of the crime of adultery has recently been a focal point of debate in Korea not only in judicial tribunals but also among the general public in relation to interpreting and identifying the relative meaning and importance of various provisions concerning fundamental human rights in the Korean Constitution and its underlying moral principles; and in relation to considering the significance of these for the provision of the Korean Criminal Code concerning the crime of adultery. The Criminal Code stipulates^K crime of adultery as follows: (1) Any person who has a spouse and who commits adultery is to be punished with up to 2 years imprisonment. The paramour is also punishable in the same way. (2) This crime may be prosecuted only when the offender is under an accusation brought by his or her spouse. (Article 241) The relevant Korean constitutional principles with respect to the issue of the constitutionality of the crime of adultery mainly involve the following: First, the principle of human dignity and worth and the right to pursue happiness. (Constitution, Article 10) Secondly, the principle of the protection of privacy. (Constitution, Article 17) Thirdly,

gender equality and the dignity of the individual person in marriage and family life.(Constitution, Articles 11 and 36:1)

There has been a strong challenge by the liberals against the current provision for the crime of adultery in the Criminal Code on the ground that adultery is not such a grave moral wrong worthwhile attracting public concern. Alternatively, although it is conceded to be a wrong, it is argued to be at most a kind of wrong which is better dealt with by civil action or moral sanction, unsuitable to legal punishment. In either case, the criminalization of adultery is open to attack as unconstitutional. Liberals argue that the regulation of adultery by criminal law becomes increasingly anachronistic in light of contemporary development of liberal sexual morality around the world and thus is inappropriate to keeping pace with the current liberalising trend of the criminal justice system in developed countries.

I shall discuss this issue in following order. First, is the act of adultery morally reprehensible wrongdoing at all as many people deem it to be? If the above question can be answered affirmatively, then, is that wrongfulness of adultery a private matter to be dealt with only in a civil action, or a wrongdoing involved with the public interest? Secondly, if adultery is a wrongdoing not only of private but also of public concern, then does the state have a legitimate interest to impose a penal sanction on the party or parties of adultery? And further, if the above question can be answered affirmatively, what kind of punishment is

fitting to the wrongdoer? Here, my position is to defend the constitutionality of crime of adultery according to a sound interpretation of the relevant provisions of the Korean constitution. This interpretation is made possible, I believe, by the principles of justice advocated previously in this thesis.

III.2. Morality of adultery.

First, as to morality of adultery. Here, adultery refers to the voluntary engaging in sexual intercourse with someone other than one's marriage partner. It involves infidelity or unfaithfulness in the marriage relationship, especially in its sexual aspects. Adultery may be generally considered immoral by both the Western and the Eastern society. However, the question here is on what grounds society thinks of adultery as immoral.

The main argument against adultery may begin from the fact that it is a direct violation of the most personal and intimate human contractual relation into which two people can enter. When people get married, they usually contract to live together as husband and wife and to be faithful to one another - this especially means sexually faithful. Committing adultery usually involves lying, cheating, and infidelity on the part of one marriage partner or both, and these actions altogether are apt to constitute a violation of the sound moral sense of community. Adultery is also destructive of the marriage relationship; it corrupts the family line and the unity of the family, it can lead to separation or divorce and to the injuring of innocent

children.

However, it is foolish not to recognize that many marriages are not ideal, that one or both of the partners may not relate well to the other at any level, including the sexual. This means that dissatisfied partners often look for other human relationships which will fulfil them in ways their own marriage relationship will not, and when their marriage relationship is an unhappy one, people are often tempted to engage in adultery with a person who they feel would make them happy or give them pleasure, even if only for a brief period of time.

Here, the argument for condoning adultery or for even justifying it is that individuals ought to be free to do what they want to do in terms of their own pursuit of happiness in private sex lives, and whether they lie, cheat, or are unfaithful to their spouses is their business and no one else's - certainly not society's. Some people who condone adultery would say that the basic ethical assumption here is that "what they don't know won't hurt them"; bad results only occur when adultery is discovered. They defend this position by saying that if adulterers are discreet and can avoid breaking up their families, then nothing is wrong with adultery. Furthermore, some argue that families will not be broken up under above circumstances because, according to this argument, adultery provides a means by which unsatisfied spouses enjoy a satisfying sex life and their families continue to have economic security and social status. They maintain that as long as these affairs can be conducted smoothly and

no harm is done, then nothing will be wrong with adultery. These are, after all, private sexual matters, and society should not interfere in any way.

However, these arguments for condoning adultery are deficient and refutable in the views expressed previously in our principles of justice and the common good in this thesis.

First, adultery cannot be a genuine autonomous action which free moral agents are allowed to enjoy according to their right to pursue happiness but an action of self-indulgence beyond the confines they once voluntarily delimit by the marriage contract; they can exercise their right of self-determination in sex life before their marriage is contracted and after their marriage is dissolved.

Secondly, marriage as an institution is regarded as necessary to signify the maturity of the union between a man and a woman and to testify that its essential is a love on which a lasting union and a basic community can be based. Where free love or adultery is accepted, the institution of marriage plays a minor or inessential part. The sound social structure and ethical lives of people trustfully built and maintained by a monogamous family system as a basic unit of society will be put into danger of collapse. Without the healthy maintenance of the institution of monogamous marriage between couples, an adulterous person is necessarily degraded in the sexual relationship to the status of an object of pleasure for another person, and this is incompatible with the demands

of the human good of self-fulfilment and excellence.

III. Criminality of adultery and its punishment.

According to the previous discussion, we are justified to claim that adultery is immoral, blameworthy, and furthermore adulterers are in most cases deserving of a sanction since the act of adultery commonly involves a harmful disruption of the basic fabric of the social institutions of marriage and the family. However, this moral evaluation does not always necessarily lead us to regard the act of adultery as a crime and to justify its punishment by a penal sanction. As there are diverse shapes of love and of life in marriage between two partners over the length of their relationship even within the ambit of the normal marriage form, there may be various reasons, simple or delicate, straightforward or complicated, which can justify a married person's committing adultery. Adultery may be caused not by the fault of one spouse alone, but of both; adultery committed by one or both partner may be a reflection of their unhappy married life for which both parties are to blame, though the degree of their blame may differ. Anyhow, in those cases, it would be extremely difficult to detect precisely who is at fault and to what degree in relation to one or both partners committing adultery. In this seemingly shadowy and volatile affair in the married life of individuals, it would be doubtful in what if any way the state should intervene with the criminal law. Given all these, what can be the

underlying values that justify the state's criminalization of adultery?

The criminalization of adultery may involve the following positive effects: the society formally condemns and disapproves the act of adultery as a crime and stigmatizes the adulterer as a criminal. Is it worthwhile legal policy to establish a crime of adultery? Is this legal policy, if adopted, acceptable by the general public? As I have argued in my account of the system of justice, legal desert or institutional desert is not identical with moral desert though the former derives originally its legitimacy and validity from the latter. However, the law's business is concerned with not only realizing moral desert and justice but also maintaining positive order and security by implementing legal mandates.

Of course, realizing moral desert and justice is not necessarily distinct and separable from maintaining positive order and security. On the contrary, there is often overlap between them, though such an overlap would occur most certainly in the ideal state of legal administration. Protecting the common good and order of the society from disruptive immoral practices or subversive rebellion is not only a matter of justice but also a matter of legal security and social utility. However, these two matters are liable to diverge when the state sticks to preserving the positive order and vested interests for the sake of social security and continuance of established utility while it neglects to follow the progressive norm of corrective justice which reflects the changed circumstances

of reciprocal social relations of the persons concerned.

Then, the question is on what ground the state can plausibly justify its use of criminal law to punish the adulterer. It may involve a justification based not only on justice but also on social utility. Now, the task before us is to discern by which form of combination between two seemingly competing principles of justice and utility we can account for the particular application of criminal law to the act of adultery. However, I have argued that in order to achieve the common good of society the principle of justice should take priority over the principle of utility in their application. And the principle of justice essentially should take the notion of teleological desert.

I suppose that most western countries have abolished the crime of adultery not because they think that adultery is not immoral and not unfair to the marriage partner and the children through violation of reciprocal trust and fidelity, but because they believe that its criminal punishment may entail a grave risk of curtailing individual freedom and encroaching on private life beyond the limit of the reasonable exercise of law. The western policy of non-intervention by the state into private sex life by eliminating the crime of adultery from the criminal code after World War II seems to reflect the currently influential political morality in the West - namely, the principle of the neutrality of the state, the principle of liberal individualism, and the moral disestablishment of law. Accordingly, it may be argued by the liberal theorists who advocate the above principles that since there is a

plurality of values and diverse ways of human life, the definition of human good and particularly the way to pursue happiness in married life is a matter of each individual persons's concern not suitable for state intervention with legal regulation. It would be their contention that the way of permitting individuals to pursue happiness and the human good in their own manner with a liberal contour of law may enhance happiness more than does the way of the state's paternalistic intervention with a law charged with public morality. Thus in this sense, the western system of criminal law, influenced by the above principles, with particular reference to sex offences, seems to be a reflection of the political philosophy of liberalism and utilitarianism. However, I suppose that those ideas of liberal and utilitarian political morality, though they may be very plausible in enhancing the individual person's freedom and his or her (liberal) right to privacy, are not likely to be suitable entirely to people living in Korean society, where the deep-rooted tradition of communitarian value and perfectionist virtue ethics still persists. The Korean Constitution stipulates a provision about the value of marriage and family life based on and maintained by the individual person's dignity and gender equality.(Article 36:1) This may be interpreted as a reflection of the traditional value of stressing the integrity of the family system, though it is expressed in the contemporary rights-based language of human dignity and equality. The provision of the crime of adultery in the Korean criminal code may be interpreted as a reflection of the public aspiration and

the common morality for preserving the integrity of family life. It may be also interpreted as a societal mandate to punish the adulterer's self-indulgence in pursuing individual freedom and happiness in a manner considered to be incompatible with harmonious common happiness shared with other members of the family.

However, the above account should not be interpreted as giving whole-hearted support to the present provision of the crime of adultery in the criminal code and the current practices of its enforcement. Although it may be supported by the consensus of contemporary Korean people to maintain the provision of the crime of adultery for the sake of fair relations between married couples and the common good of the members of a family, it should not be applied to an attempt to encroach beyond the reasonable limit of police power exercisable in relation to the private lives of married persons in its enforcement and furthermore the degree of punishment should not exceed that for other similar sexual offences. The present provision of the crime of adultery which stipulates a single way of punishment with up to 2 years imprisonment may be considered too harsh and repressive compared to the crime of procreating prostitution which is punishable by either imprisonment or a pecuniary penalty. Also, it may be considered excessive compared to the non-provision of criminal punishment in the criminal code for other sexual offences considered to be violations of traditional morality such as incest, homosexuality, and bestiality. The harsh and excessive provision of sanctions for the crime of adultery has been

strongly attacked by criminal lawyers as well as the general public on the grounds that it has been liable to be abused by spouses with intent to blackmail, and the use of police power in this case has tended to encroach excessively into the private affairs of the persons concerned.

Thus, the suggestions we can make to improve the present provision of the crime of adultery and the current practices of its enforcement are at least three: firstly, it is desirable to revise the present provision of single way of punishment to multiple choices of punishment either imprisonment or pecuniary penalty which are applicable according to the circumstance of cases; secondly, the degree of punishment should be adjusted in a lenient way in proportion to other sexual offences and in the light of current penal policy of non-intervention into other similarly blameworthy sexual offences such as incest, homosexuality, and bestiality; and thirdly, the police investigation and the state prosecution of the crime of adultery should strictly observe due process of law to protect each individual person's right to privacy and to a fair trial.

CONCLUSION

So far I have tried to establish a theory of justice which would be plausible and acceptable in contemporary Korean society. The basic idea of justice in this thesis is based on the notion of teleological desert. The teleological desert theory employs the concept of desert as a primary justifying rationale and the function of moral communication, rather than the traditional utilitarian purposes, as an inherent but subordinate element in the justifying rationale of reward and punishment. Here the idea of desert-based justice involves maintaining an equilibrium between benefits and burdens. The desert-based theory holds that a society is just when the distribution of benefits and burdens is in accordance with good and ill desert. The notion of due desert has the advantage of explaining the centrality of human agency in the idea of justice. This is because the general underlying aim of this conception of desert is to screen out all those factors that are unearned, that are beyond human control.

However, in this thesis I have proposed a two-stage theory as to the complete justification of reward and punishment; the first stage deploys the principle of justice based on desert, and the second stage deploys the principle of the common good. Since justice is not the whole, though it is central and a particularly important element of social morality, a justification of reward and punishment based on justice is not sufficient for a complete justification of those kinds of treatment. The

complete justification which must be based on the common good needs an extra consideration of utility in the individual case in addition to the primary test of justice.

For establishing the above premise I have employed seven supporting principles. Firstly, while there are diverse basic human goods and values of life in society, namely, self-preservation, self-development, happiness and harmony, and practical reasonableness, the ultimate end to which the rational human pursuit or possession of such goods is directed is self-fulfilment and flourishing (the thesis of self-fulfilment). Secondly, In making progress toward self-fulfilment, the human being, though he is in his thought and conduct influenced by his social, psychological, and physiological conditions, is by his fundamental nature regarded as possessing and exercising free-will. As to the principle of responsibility of a free and rational moral agent, autonomous action, personal choice, and one's desert on account of one's acts and choices will be a proper basis for rendering one's due reward and punishment (the thesis of free-will and autonomous action). Thirdly, any distributive inequality in reward and punishment according to desert is only justified if in regard to the matter of distribution everyone has been given an equal opportunity to participate and exert effort (the thesis of equal opportunity for desert). Fourthly, any distributive inequality in reward according to desert is only justified after each member of society has given an equal satisfaction of basic needs according to the principle of needs (the thesis of equal satisfaction of basic needs).

Fifthly, desert discourse and thus justice discourse are in their nature teleological since invoking or administering justice requires a communication and sharing of a common sense of justice among the members of a community or society, and this development and sharing of a common sense of justice is of value since it creates the conditions for nurturing the other human virtues in society (the thesis of desert and justice discourse as teleological communication). Sixthly, since human nature and the idea of justice are essentially teleological, the concept of justice as a static equilibrium, or as formal reciprocity, requires to be transformed into a dynamic equilibrium, equitable reciprocity with due regard for the common good where the seemingly conflicting ideas of liberty, equality, and solidarity are fully intertwined and harmonized as a condition of social homeostasis (the thesis of dynamic equilibrium and harmony) And seventhly, where rewards or punishments are apportioned by public institutions, the proper criterion for a person's reward or punishment is not abstract moral desert but institutional desert, determined according to whether or not the person succeeds or fails in fulfilling the requirements of institutional rules or laws which have themselves to be justified by their tendency to secure abstract desert and the common good (the thesis of institutional natural law).

I have argued that the above framework and principles of justification for reward and punishment are plausible as a basis for better understanding of and better solutions to concrete problems. This is because my theory has intended

to derive its moral justification from the desiderata of contemporary Korean political culture, that is, a liberal-communitarian conception of justice which is an amalgam between liberal individualism and traditional communitarian values. Although the achievement of this kind of synthesis between two seemingly inconsistent and incompatible principles appears to be uneasy, I have argued that it can be made possible through the approach of a liberal perfectionist virtue ethics: for each member of society to become a more excellent human being in an autonomous way is a most viable way of realizing justice not only in personal relations but also in society at large. In order to nurture perfectionist virtue I have advocated a creative reconstruction of traditional Confucian ethics in a way that can suit any contemporary industrialized and capitalist society. The essential elements worth drawing from traditional Confucian philosophy seem to be a kind of work-ethic that stresses self-fulfilment and human perfection through hard work and the nurturing of virtue, rendering a person due reward and punishment according to his or her desert, and the priority of righteousness and harmonious common good over social utility understood in purely hedonistic terms.

However, here again equal stress should be put on the right to individual autonomy and self-determination which is an essential element to establish and identify a person's desert and responsibility. The notions of human dignity and worth and the individual right to freedom and equality which were transplanted to the East from the West

have under rigorous pressure taken root in the Korean political culture as can be seen in the Korean constitutional history of the recent past. I suppose that the protection of the individual right to autonomy and privacy is an inviolable principle in Korean political morality. I believe that the theory of justice I have espoused in this thesis which comprises the three principles of desert, needs, and legal rights may find its justification in the prevailing political morality of the great majority of contemporary Korean people. This is also reflected in the principle of the liberal welfare state to be drawn from the present Korean Constitution.

Finally, it is to be stressed again that although the principle of justice is essential and pivotal to building and maintaining a good society, it should not be regarded as an absolutely superior or all-encompassing notion to be applied to resolve any social issues. The principle of utility has a complementary or auxiliary part to play, and sometimes qualifies justice in a way which is necessary for securing the common good.

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